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a study on consumer misleading and unfair trade practices

vol.1



**second stage revision
combines investigation act 1976**

prepared for the Department of Consumer and Corporate Affairs
The Honourable André Ouellet, Minister



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PROPOSED POLICY DIRECTIONS
FOR THE REFORM OF THE REGULATION
OF UNFAIR TRADE PRACTICES
IN CANADA

Volume 1

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Price : Canada : \$7.50

Other Countries : \$9.00 Catalogue No. RG52-8/1976-1

Price subject to change without notice

Information Canada
Ottawa, 1976

FOREWORD

Our terms of reference required us to develop a model regulatory framework for the regulation of misleading advertising and residual unfair trade practices in the consumer marketplace. Our mandate required us to ignore constitutional and political considerations but instead to formulate a clear set of ideal policy objectives and evaluate and propose ideal policy instruments for their attainment. With these before the different levels of government involved in this field in Canada, it was felt that constitutional and political judgments as to the different jurisdictional roles were more likely to be arrived at with a clearer perspective of the end in view. Thus the proposals in this report are directed to no particular jurisdiction and imply no judgments whatever as to appropriate divisions of jurisdictional responsibility. These matters, specifically unfair trade practices legislation, will be dealt with in another report.

Why a fundamental re-evaluation of advertising regulation at this time? Indeed, both the Federal Government and, more recently, several provinces have been actively and extensively revising their laws, and a casual observer might feel entitled to infer that clear policy directions and a rational, comprehensive "game-plan" under-ly these changes. Unfortunately, this conclusion would be unwarranted. First of all, many changes in our laws smack of pure pastiche -- legislative spur-of-the-moment responses to a public outcry at the latest real or imagined marketplace abuse. We have appended to the report as Appendix A a survey, prepared by Departmental officials, of advertising regulation in several major Western jurisdictions, much of it of recent vintage, to underscore the widely disparate, and indeed, in policy terms, incoherent patterns of regulation on fundamental, conceptual issues.

Apart from the ad hocery that pervades the law in most jurisdictions in this area, the heavy dependence on a criminal law approach to unfair trade practice regulation has attracted increasing concern both from affected interests and from detached analysts of regulation. The Law Reform Commission of Canada has rightly challenged the indiscriminate use of the criminal law, and concepts of strict liability in regulatory contexts, when the moral stigma attaching to a criminal conviction may bear little or no relationship to the degree of real fault, if any, involved. The Commission

has also pointed out that the severe limitations inherent in the traditional criminal law sanctions of a fine or imprisonment overlook, for example, the importance of restitution or compensation to victims of violations, a sanction which may much more effectively advance both deterrent and compensatory objectives in our legal system.

Beyond these considerations, the recent enactment by three provinces of comprehensive unfair trade practice legislation, and the likely passage of similar legislation in other provinces, has created major overlaps in Federal and Provincial laws. These overlaps are confusing both to the consumer and businessman, expensive for the latter facing multiple and possibly contradictory compliance requirements, and wasteful of public enforcement resources.

A fundamental rationalization of who is to do what in this field can wait no longer. Further patchwork has become impossible. While this rationalization obviously must ultimately involve constitutional judgments and political negotiations, all too often in such a process the real purpose intended to be served by the controls in question is lost sight of. The process tends to become more important than the purpose. The function of this paper is hopefully to put in the forefront of this process of rationalization a clear set of policy objectives that must be met if the consumer interest is to be adequately protected, irrespective of the subsidiary question of who is to do what part of that job.

It is proper to conclude these opening comments with attributions for the various chapters in this study. Mr. A. Duggan was principally responsible for Chapters II and III and substantial aspects of Chapter I. Professor M.J. Trebilcock and Ms. L. Robinson were responsible for Chapters IV and V and secondary aspects of Chapters I, II and III. Mr. H. Wilton-Siegel was responsible for Appendix B, the economic analysis of advertising controls and competition policy appended to this report. Professor C. Masse was responsible for Appendix C of this report, dealing with private law redress under Quebec law. Professor Trebilcock coordinated the study.

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I. DIRECTIONS OF UNFAIR TRADE PRACTICE REGULATION: AN EXAMINATION OF OBJECTIVES

Introduction

Legal controls over advertising content have traditionally been confined to the relatively narrow goal of prohibiting statements which are 'misleading', a characteristic tested by application of the objective distinction between truth and falsity.¹ A further limitation, which is immediately evident, is, in a sense, a product of this approach. It has been said that most advertisements operate on two levels. They have an informative content, which brings to the attention of the potential buyer the type of commodity or service for sale, its quality, serviceability, usefulness and price. There is, in addition, a persuasive element in the advertising message which is directed to the transformation of latent wants on the part of an individual into effective demand for a good or service and which encourages a decision to purchase.² Promises may be made, or messages communicated, at either the informative or the persuasive level. Yet in many jurisdictions legal controls operate almost exclusively on the former level.³ This is true at present of the Canadian federal legislation, prosecutions under which are generally concerned with misleading claims relating to such matters as price, quality or availability of a product.⁴

The question arises as to whether, in view of the nature and impact of current advertising techniques, these referents for control are too limited. Should regulation extend beyond the prohibition of misleading advertising claims? In particular, is there a case to be made for imposing restrictions on claims made in the persuasive--as opposed to the informative--area of advertising messages? If so, what limits are to be set on the extension of regulatory activity? These are the themes to be developed in this chapter.

Theories of Unfair Trade Practice Control

Introduction. There has, in some jurisdictions--most notably the United States--been a move away from the view that the sole function of advertising legislation is the prevention of deception. The theory is rapidly gaining

acceptance that the aim of advertising should be to provide consumers with product information and that, therefore, regulation should be directed to ensuring, as far as possible, that this goal is attained.⁵

The two approaches--the prevention of deception and the attainment of a satisfactory level of informative content in advertising--are, as formulated, complementary but can, in their implications, be quite distinct. The former is directed to the essentially negative function of preventing misleading advertising, while the latter envisages the more positive role for regulatory activity of injecting into advertisements data, previously omitted, which is considered necessary for informed consumer choice. It is proposed to examine each of these approaches in turn.

Preventing Deception. There has always been a sound theoretical basis for singling out the untruthful claim for censure. Some of the results which can be said to flow from false advertising are as follows. First, it is commercially disruptive in that it lures customers away from truthful producers and perhaps superior products and undermines the proper functioning of advertising by weakening consumer confidence in products and producers generally. Or, from the point of view of market structure, it encourages a situation where returns to producers are geared not to their efficiency, but to their ability to utilize inaccurate information. Secondly, with regard specifically to its impact on consumers, it induces transactions premised on false data and burdens consumers with products which do not fulfil their needs.⁶ Finally, the moral implications of both lying and propagating half-truths tend, in varying degrees, to separate the untruthful advertising claim from those to which objection might conceivably be made on other grounds.

This last factor, however, provides a clue to a major shortcoming in the approach. The prevention of deception is, ex hypothesi, based on the distinction between truth and falsity. Yet, it has been argued that the distinction, at least if applied rigidly, is workable in only the most blatant cases of advertising transgression.⁷ The point has been eloquently urged in the following terms:

The broadest of the old distinctions which no longer serve us as they did is the distinction

between 'true' and 'false'. Well-meaning critics (including many in the advertising profession) who say the essential problem is false advertising are firing volleys at an obsolete target. Few advertisers are liars. A strong advertising profession has its own earnest ethic. Lies are not so readily diffused through newspapers and magazines, over radio and television. They are not so eagerly believed. The 'evils' of advertising could be easily enough reduced if they came only from lies. The deeper problem is quite different. In some ways it is quite opposite. Advertising befuddles our experience not because advertisers are liars, but precisely because they are not. Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of the Graphic Revolution has put a new elusiveness, iridescence and ambiguity into every-day truth in twentieth-century America.⁸

In many cases, analysis of advertising claims in terms of whether they are true or false is founded on a limited perspective and will gloss over forms of harm whose existence cannot accurately be tested by the application of that distinction. In the first instance, the distinction will work tolerably well when applied to claims made in the 'informative' sector of an advertising message: it is not usually difficult to ascertain whether the price at which a product was advertised was in fact the price at which it was sold, or whether the quality of an advertised product corresponds with its quality as advertised. But shortcomings in the distinction come to the surface as the search proceeds for effective remedial measures. Presumably, the more closely the regulator scrutinizes advertising claims, the more adept the copywriter becomes in the creation of slogans which defy meaningful scrutiny on a true/false basis. In some cases, a finding that a claim is misleading or untruthful will result in nothing more than the replacement of one superlative with another,⁹ or of an alluring claim with an equally alluring image.¹⁰

Where efforts are made to impose controls on image advertising, the distinction becomes not only unworkable, but irrelevant. In many cases, it is simply not possible to assess an image appeal in terms of truth and falsity. More importantly, the problems to which image advertising can be

said to give rise are only indirectly connected with the issue of truthfulness. As will be seen shortly, the principal attacks against image advertising are directed against its tendency to distract consumers from other, arguably more important, issues concerning the product at hand and against those claims which exploit the susceptibilities of the audience to which they are directed. The problem, in these cases, centres not around the abstract characteristics of the claim itself, but around the effects which it produces.

It is apparent, therefore, that if advertising control is to be extended beyond the 'informative' area, the prevention of deception will be too narrow a goal and the true/false distinction too limited a tool. The question, therefore, becomes whether the more positive 'information ethic' provides an acceptable theoretical alternative on which to base legislative reform.

Making Advertising Informative. The theory underlying the more positive approach to advertising control is that consumers are entitled to comprehensive and accurate information concerning products which they intend to purchase. Insufficient information can lead just as readily to unwanted purchases as information which is false. Therefore, it is the task of producers to ensure that necessary, basic product information is communicated. It does not follow that advertising should be the only vehicle for the provision of information, but to the extent that it is the principal line of communication between buyer and seller and is financed by the buyer, it must shoulder at least some of the responsibility in this regard.¹¹

Yet, the theory embraces wider economic considerations which extend beyond the immediate need of the consumer for information. Competition is, in a free enterprise system, the major force for regulating market behaviour. Competition depends, in its turn, on the operation of informed consumer choice between competing products and on the determination, through exercise of that choice, of price and quality among the various products in a market. Where competition of this order is absent, there is little incentive for producers to keep prices down and quality up. Accordingly, the provision of product information to consumers can be seen as a means to the end of preserving the orderly functioning of the market and as serving more far-reaching economic interests than individual consumer satisfaction with particular products.

In promoting advertising as an appropriate vehicle for the provision of product information, the information ethic endows it with anti-trust connotations. If the full implications of the ethic are to be realized, it would seem to demand the introduction of legislation designed to control advertising practices which subvert or displace competition based on quality and price. These considerations will be returned to shortly. However, before engaging in speculation as to the ends to which the theory might be directed, it is necessary to examine its inherent limitations.

It should first be noted that although it is possible, on a theoretical basis, to distinguish the 'informative' approach from the 'misleading' approach in terms of positive and negative functions, the practical difference between them is not so clear-cut and becomes further clouded as regulators working under a purely negative mandate extend their activities beyond the patently untrue statement. It can, on the one hand, be said that the excision of a false claim makes an advertisement more informative so that the exercise has positive elements and, on the other, that a requirement that a particular advertisement convey more information has negative aspects in that it reduces the likelihood of deception.¹²

The 'informative' approach is, in a sense, a corollary of the view that advertising should not be misleading. But it is in its implications that a distinction becomes apparent. It is based on a number of assumptions which require articulation.

The first, and most sweeping, assumption is that the aim of advertising is to inform. It might more accurately be stated that the aim of advertising is to persuade or, even less circumspectly, to sell something.¹³ There may be only a slight literal difference between the goals of informing and informing for the purpose of selling, but in practical terms, the goals are almost antithetical--information is, supposedly, a consumer's tool whereas persuasion is a producer's weapon. Accordingly, making advertising informative in a meaningful sense may prove to be a formidable task. There is a point in every advertisement where the aim of persuasion and the drive for information will conflict.¹⁴ If the information ethic is pushed too far in this conflict, it may require a fundamental change in the direction of current advertising and a reassessment of its role in marketing

strategy. And these tasks will not easily be performed for, by its very nature, the advertisement can be expected to present only one side of a case. To attempt otherwise would be self-defeating. Advertising--like many other forms of communication--is, in this respect, an exercise in advocacy. To condemn resort to persuasion and polemics in advertising, while tolerating similar tactics in the classroom, in the pulpit and on the hustings, smacks of discrimination.¹⁵ Yet, so long as the persuasive function of advertising prevails, it will continue to offer only one viewpoint at the expense of the information ethic. It seems, then, that there is a point beyond which positive legal requirements cannot go.

The second assumption is that it is possible to differentiate between statements which are informative and those which are not. It has been suggested that facts important to informed decision making include the price, other terms of sale, the existence of possible substitute goods and the capabilities and durability of the product.¹⁶ But even if it is conceded that it is the task of the advertisement to convey this information, the suggestion does nothing more than indicate the facts which should be included. It does not address the questions as to whether, and in what circumstances, statements or appeals should be excluded from an advertisement.¹⁷

The problem is a real one for it can, on the one hand, be said that the mere offering of information is a persuasive act¹⁸ and, on the other, that even blatantly persuasive advertisements do contain some information--that the product exists, for example, or that a certain movie star smokes a certain brand of cigarettes.¹⁹ In the final analysis, that last statement is as much information as anything else. It may not be desirable or relevant information, but in the absence of criteria for determining desirability and relevance, it cannot be impugned.

The final assumption underlying the theory is that the information which it seeks to inject into advertising would make a difference. It is arguable that the approach takes too little account of personal limitations in the consumer. For one thing, some consumers may be insufficiently educated to understand the data which is thrust at them. This is not a patronizing consideration for as goods and services become more complex, so will the information which is required to explain them.²⁰ The position has already been

reached in some instances where products are so complex that it is not only the uneducated, but also those lacking detailed technical expertise who are disadvantaged. There is some truth in the assertion that the only way the consumer can now make a free choice is

to train himself as a mechanical and structural engineer before he buys a car, to carry a spectrograph when he buys home appliances or a Geiger counter when he buys a TV set.²¹

Conclusion. All of these considerations indicate that if a philosophy of information is to be adopted as the guiding precept for advertising control, it can only be effective if account is taken of its inherent limitations. In some cases this will require forbearance--it cannot be applied to raise the informative or educative content of advertising to a level which, given its present structure, it is inherently incapable of sustaining. In other cases it will require positive action. There may, for example, be a need to evolve standards for determining what is necessary product information and for the selection of cases in which it would be appropriate to saddle advertisers with the responsibility of providing it. And, in all these efforts, the over-riding considerations should be whether consumers want particular sorts of information, whether they will be able to understand it and apply it in their purchasing decisions and whether it might not be more practicable to create sources of product information as alternatives, or supplements, to the advertising message.

If a limited positive role of this nature is envisaged for advertising regulation, it will be necessary to supplement the traditional legislation proscription of misleading advertising with terminology which more accurately reflects the wider considerations at issue. The format which immediately springs to mind would involve a statutory prohibition of 'unfair' advertising techniques. Precedents for resort to this term are to be found in the United States in the Federal Trade Commission Act²² and in the United Kingdom in the recently enacted Fair Trading Act.²³

If 'unfairness' is to be the guiding precept for regulatory agencies in their implementation of the information ethic, it becomes necessary to determine what sorts of advertising technique might be regarded as unfair.

Considerable guidance is afforded in this inquiry by recent developments in the policy of the Federal Trade Commission.

Categories Of Unfair Advertising

Introduction: The expanding jurisdiction of the Federal Trade Commission. Before examining the categories of unfairness which have begun to emerge from the Commission's regulatory activities, it may be useful to trace the recent development of its jurisdiction over unfair advertising.

The nature and scope of the Federal Trade Commission's powers are defined in Section 5(a) (1) of the Federal Trade Commission Act, which provides as follows:

Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.²⁴

The portion of this provision which is crucial to the Commission's jurisdiction over advertising is the phrase "unfair or deceptive acts or practices in commerce".²⁵

Despite the presence of the epithet "unfair", the efforts of the Commission have, until very recently, been confined almost exclusively to the prevention of deceptive advertising. But within that limited area the Commission has assumed an expansive approach to the problem of defining and applying the criterion of deception. In the first place, the Commission very early adopted the view that the proscription in Section 5 is not confined to actual deception and that it is sufficient if an advertisement has a capacity or tendency to deceive. Proof of actual deception is, therefore, not required in Commission proceedings under the Act. This approach received judicial ratification in Charles of the Ritz Distributors Corp. v. FTC.²⁶ In the same case it was held that, in assessing the capacity of an advertisement to deceive, the appropriate point of reference is not that of the reasonable man. On the contrary:

the law was not 'made for the protection of experts, but for the public--the vast multitude which includes the ignorant, the unthinking and the credulous'...[T]here remains 'that vast multitude' of others who, like Ponce de Leon, still seek a perpetual fountain of youth...It is for

this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements ...and should have the discretion, undisturbed by the courts, to insist, if it chooses, 'upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein'.'²⁷

In analysing an advertisement for its capacity to deceive, account is taken not of the literal truth or otherwise of statements taken in isolation, but of the general impression conveyed by the advertisement when read as a whole.²⁸ In applying these broad standards, the Commission has attacked, among other things, statements which, while literally true, make false implications, are ambiguous or omit material facts which qualify the meaning of claims expressly asserted. The range of claims which have been impugned over the years is wide; it includes deceptive statements as to the nature of the product sold, to the origin or source of the product and to price and to deception arising out of testimonials, labelling and promotional gimmicks.²⁹

There is no longer anything particularly startling about these aspects of Commission doctrine. Most of them are echoed in developments in Canadian advertising law. In the first place, it is to be noted from the above sample of claims found to have been deceptive that they can all be characterized as involving factual statements and, as such, fall within the 'informative' aspect of advertising messages. Sections 36 and 37 of the Combines Investigation Act³⁰ are clearly wide enough to embrace most mis-statements of this nature. Since the decision of the Supreme Court of Alberta in R. v. Imperial Tobacco Products Ltd.,³¹ there are grounds for the view that the 'credulous man' test enunciated in Charles of the Ritz has been imported into Canadian law. Finally, the proposed amendments to the Combines Investigation Act include a provision which would expressly require the general impression of an advertisement to be taken into account in determining whether or not a particular representation is misleading.³²

However, recent developments in the United States have broadened the theory of advertising control and it is now evident that the Commission is moving in a new direction in its activities under Section 5. In FTC v. Sperry &

Hutchinson Co.,³³ the Supreme Court reaffirmed the power of the Commission to define and regulate unfair methods of competition. With regard to the first limb of Section 5, it was held that the Commission's jurisdiction over unfair methods of competition is not limited by any requirement that the particular practice in issue infringe either the letter or the spirit of existing anti-trust laws. With regard to the second limb, it was held that the Commission was empowered to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive acts or their effect on competition. The decision had the important effect of separating the element of unfairness from that of deception. Unfairness is now a distinct and self-sufficient ground of complaint. The court noted that

The Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.³⁴

The court cited with approval factors which the Commission might take into account in determining whether a particular practice is unfair:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by the statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers.....³⁵

There is, as a result of the decision in Sperry & Hutchinson, a growing number of cases in which the specific allegation is not that an advertising claim was deceptive, but that it was unfair.

Economic Factors Bearing on Unfairness.

(i) *Reasonable basis for product claims.* Of these cases, the most important to date is a group of decisions in

which the Commission has held that it is an unfair practice for an advertiser to make affirmative product claims for which he lacks a reasonable basis.³⁶ Typically in issue in such cases are claims involving incomplete and unsubstantiated comparisons (such as Firestone's Safety Champion Tyre "stops 25% quicker")³⁷, unsubstantiated superlatives (such as "Vega is the best-handling passenger car ever built in the United States")³⁸ and glowing descriptions of product characteristics which are possessed by most competing brands (such as "RESERVE Cooling Power--only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days")³⁹.

In Pfizer, Inc.,⁴⁰ the Commission explained why such claims were considered unfair. It stressed the fact that the consumer is at a distinct disadvantage, compared to the producer, in assessing the reliability of product claims. In most cases, the costs involved for the consumer in obtaining the necessary information are out of all proportion to the price of the item in issue. In the case of complex products, the cost of obtaining the information is disproportionate to its value. Given the imbalance of knowledge and resources between consumer and producer, it is economically more rational to require the producer to supply the information on which his claim is based than to leave the consumer to seek it out for himself. In short, unfairness in this context is founded on economic considerations.

It is clear that the approach finds its rationale in the philosophy of information--that access to material product information is essential both to effective consumer choice and to the proper functioning of a competitive market. It should also be noted that the approach does not transgress the limitations inherent in the information ethic--it stipulates not that advertisers must disclose the basis for their claims in the advertising message, but simply that they must not make unsubstantiated claims. The approach only becomes a vehicle for the provision of information when it is coupled with the Commission's advertising substantiation program. Under the substantiation program, selected advertisers are required to submit to the Commission documentation and supportive evidence for affirmative claims made in their commercials. Data collected in this way is made available for public inspection. Doubts immediately spring to mind as to how useful, in terms of accessibility and comprehensibility, information of this nature can be. These difficulties will

be canvassed in a later section of this work where the substantiation program is examined in some detail. For present purposes it is sufficient to note the economic considerations bearing on this aspect of the 'unfairness' approach and the drive for information on which these considerations are founded.

(ii) *Artificial product differentiation.* One of the most frequently criticized aspects of modern advertising is the prevalence of techniques designed to create artificial distinctions between competing products which are essentially indistinguishable. The impetus for resort to these techniques has, it is said, arisen out of the refinement of industrial processes which are now geared to the mass production of identical consumer goods. Because the market for any one item is finite, all of these goods can be sold only if they are made to appear different, and to fulfil different consumer needs.⁴¹ Advertising is potentially the most effective device for performing this task; hence, the prevalence of advertising techniques which studiously avoid reference to the physical characteristics of the products they are promoting and which concentrate instead on building product image--on holding out imaginary benefits to be derived from use of the product.

Perhaps a more concrete explanation for the prevalence of the phenomenon is that producers, particularly in highly concentrated industries, find it less of an economic risk to compete on the basis of promotional techniques than to engage in price or quality rivalry. In these cases, as a result either of express agreement or simply of conscious parallelism, the price and quality of competing brands remain relatively constant inter se, differences occurring only in the intensity and ingenuity of the advertising campaigns launched by the various producers.⁴²

Two preliminary points should be noted. First, it is the function of all advertising to highlight differences between competing products--that is the essence of promotion. However, where real differences exist between products, differentiation can result in positive benefits to the consumer by increasing his opportunities for informed choice and, less directly, by intensifying price and quality competition among producers in the relevant market. In other words, the communication to consumers of real differences between competing products is in accordance with the philosophy of informa-

tion.⁴³ The objections to which attention will here be given focus only on artificial differentiation. Secondly, although advertising is the principal device by which artificial distinctions are created, the evils lie less in the advertising itself than its more far-reaching effects. The problem is only partly one of misleading or uninformative advertising: the deeper concern is with the preservation of effective forms of competition. In many cases, resort by producers to certain advertising techniques may only be a means to the end of reducing competition; where this is so, the prevalence of artificial differentiation will be no more than symptomatic of more serious ills afflicting the market. Accordingly, if remedial action is considered necessary, it will have to be directed not to suppression of the symptom--artificial differentiation--but to the removal of the cause--the reversal of tendencies toward concentration. In short, remedies in this area would be of an anti-trust flavour. As this work is primarily concerned with the means of remedying abuses flowing from advertising itself, detailed analysis cannot be given to wider market considerations. In the discussion which follows, therefore, only passing reference will be made to possible solutions to the wider problems.

What, then, are the evils which can be said to flow from advertising geared to artificial product differentiation? The first objection focusses on the immediate impact of such advertising on the consumer himself. To the extent that advertising claims divert attention from the external characteristics of a product (price, quality, etc.) toward imaginary associations and appeals, they operate to transform irrelevancies into truths of incontrovertible import. They offend against the philosophy of information by depriving the consumer of realistic choice between competing products and obscure material product information by bombarding the consumer with refined techniques of suggestion. Galbraith describes succinctly the nature of such claims:

Even minor qualities of unimportant commodities are enlarged upon with a solemnity which would not be unbecoming in an announcement of the combined return of Christ and all the apostles. More important services, such as the advantages of whiter laundry, are treated with proportionately greater gravity.⁴⁴

The second objection to artificial differentiation

in advertising is that it can lead to increases in the retail prices of products which bear little relation to their real value. Where competition is based on promotion, the price of a product is likely to be disproportionate to its real value, because promotion is expensive and these costs are normally passed on to the consumer. Promotional rivalry is self-generating--a successful advertising campaign by one producer begets more intensive advertising efforts on the part of his rivals. As advertising intensifies, prices increase further.⁴⁵ Moreover, with the displacement of price competition, the forces regulating the upward spiral of retail prices are weakened, while the ability of producers to set their own level of profits and to absorb selling costs by manipulating prices is correspondingly increased.⁴⁶

Finally, it has been argued that artificial differentiation can assist directly in the tendency toward concentration in the markets in which it is used. It operates in this respect by creating barriers to the entry of prospective competitors into the market. In some cases, the only way in which a prospective entrant can overcome brand loyalty, engendered by artificial differentiation, for existing products is by mounting an intensive advertising campaign. His task becomes all the more difficult where established producers intensify their own promotional activity in order to force the newcomer's advertising costs even higher. The cost of entry can, in these circumstances, be prohibitive.⁴⁷

There are, unfortunately, formidable difficulties, both theoretical and practical, confronting the implementation of legislative measures to counter the effects of artificial differentiation.

The theoretical difficulties arise out of the intense disagreement among economists as to how real is the problem. It has, on the one hand, been asserted that rivalry based on differentiation can benefit the consumer because it encourages manufacturers in the development of new products and in experimentation designed to improve existing products.⁴⁸ More specifically, the monopolistic tendencies of artificial differentiation have been disputed. Posner, for example, argues that advertising does not create barriers to entry. Even where the new entrant is faced with high advertising costs, the existing firms are themselves forced to incur heavy costs in order to maintain their position. Moreover, the new entrant gets a 'free ride' on the advertising

of existing firms which has already secured public acceptance for the product. And, in any event, the new firm always has the option of advertising less and under-pricing the existing firms, while relying on the retailer to publicize the availability of the new, low-priced substitute.⁴⁹

At the other end of the scale are those who would endorse the view that advertising aimed at the creation of artificial differentiation is, for the reasons outlined above, to be condemned. Included in this school are official sources in the United States,⁵⁰ the United Kingdom,⁵¹ and Canada⁵².

And then there is Galbraith's analysis. While viewing advertising of this nature as inhibiting competition and thus as imposing additional costs on the consumer, he regards these effects and, indeed, advertising itself, as merely symptomatic of a larger evil whose roots lie in the political structure of Western society and in the social values which it has embraced. According to Galbraith's perception of the new industrial state, the marketing system has departed from its traditional function of serving pre-existing needs in the consumer and is now directed toward the creation and stimulation of artificial wants.⁵³ The shift has occurred as a result of changes in the market place which necessitate the management of demand to meet production and the shaping of attitudes to ensure the effective functioning of the industrial system.⁵⁴ The creation of wants is achieved in two ways; first, through advertising techniques which appeal to such personal attributes of the consumer as sexual aspirations and social acceptability and secondly, by reliance on the upward spiral of living standards and the continual struggle of society to maintain those standards.⁵⁵ This process has replaced competition as the governing force in the market and it is, therefore, pointless to attempt to restructure advertising and other trade practices for competitive ends.

Yet, despite this welter of conflicting theories, there have, in some jurisdictions, been signs of official reaction against artificial differentiation.

In Kellogg Co. et al.,⁵⁶ the Federal Trade Commission issued a complaint, under Section 5 of the Federal Trade Commission Act, against four of the largest manufacturers of ready-to-eat cereals in the United States, alleging that they had adopted practices aimed at the illegal monop-

olization of the industry. Specifically, the complaint alleges that the respondents have introduced into the market a profusion of cereal brands and that they have employed intensive advertising, aimed particularly at children, designed to conceal the true nature of the products and to create artificial distinctions between them. It is alleged that, in furtherance of these ends, respondents have steadily increased the level of their advertising expenditure, increasing the retail prices of their respective products and creating high barriers to entry into the cereal market. The principal ground of the complaint is that the respondents' advertising practices amount to unfair methods of competition or deceptive acts or practices in commerce in that they have the capacity to mislead consumers, and particularly children, into the mistaken belief that real differences exist between the various cereals. The case has, to date, not proceeded far beyond the complaint stage, but in denying a recent motion by General Mills, Inc., one of the respondents, for summary dismissal of the complaint,⁵⁷ an administrative law judge relied heavily on the Supreme Court ruling in Sperry & Hutchinson Co. If the complaint is sustained, one result may be the development, out of the notion of unfairness, of an entirely new anti-trust law prohibiting advertising which, through image appeals, unsupported factual assertions or simply sheet intensity, assists in brand proliferation, artificial differentiation and the further accretion of monopoly power in already concentrated industries.

Similar conclusions were reached by the British Monopolies Commission in respect of advertising practices engaged in by Procter & Gamble and Unilever, the largest manufacturers of household detergents in the United Kingdom. The Commission noted, in its report on the detergent industry, that

competition in advertising and promotion has tended to displace price competition. The effects of this are not only to increase prices to the extent that the additional expenditure in this field is wasteful, but also...to keep new entrants out of the market, to weaken other competitive restraints on prices and profits, and to create a situation in which even the less successful of the two competitors can earn extremely comfortable profits while those of the more successful are outstand-

ingly high.⁵⁸

Similar concerns were more recently expressed by the Commission in a report on the supply of ready-cooked breakfast cereals in the United Kingdom.⁵⁹

However, even if it is possible to resolve the debate concerning artificial differentiation into a firm policy commitment to its eradication, there still remains the practical problem of devising measures by which this can be achieved. The problem is a formidable one because, as has already been noted, advertising is usually only a symptom, not the source, of the evil. The Federal Trade Commission's complaint in Kellogg includes a proposed order which envisages the imposition of one or more of the following forms of relief:

- (1) Divestiture of respondents' assets with a view to the formation of new corporate entities to engage in the manufacture, sale and distribution of ready-to-eat cereals.
- (2) The implementation of a licensing scheme over existing trademarks to prevent the further proliferation of brands in the market.
- (3) Prohibition of mergers in the industry.
- (4) Prohibition of any practices found to be anti-competitive, including shelf-space services or use of particular methods of selling or advertising.
- (5) Any other measures which may later appear to be necessary to counter and remedy the effects of the respondents' anti-competitive practices.

The solutions proposed by the Monopolies Commission to the problems afflicting the detergent market were less far-sighted in that they contemplated not market reorganization, but simply eradication of the more immediate problems. They included:

- (1) the imposition of an order requiring substantial reductions in the wholesale selling

prices of both Procter & Gamble and Unilever;

- (2) the institution of negotiations between the Board of Trade and the two companies with a view to securing a 40 per cent reduction in the selling expenses of their respective products;
- (3) (tentatively) the introduction of a measure under which selling expenses in excess of an approved percentage of net wholesale turnover would be disallowed as an expense for taxation purposes.⁶⁰

On the other hand, in its report on the breakfast cereal industry, the Commission appeared to adopt a defeatist attitude. It admitted its inability to formulate practical measures for restructuring the market and recommended only that the profit margins of the firms involved be kept under constant review.⁶¹

It is, unfortunately, beyond the scope of this chapter to engage in a detailed analysis of these measures. They have been sketched in outline simply for the purpose of indicating that if legislative action is contemplated against advertising aimed at fostering artificial differentiation, there is a need for careful research into the questions of defining the nature and source of the evil with precision and of evaluating the effectiveness of various policy instruments that might be selected by way of response to the problem. Some of the issues dealt with in this section are explored in more detail in Appendix B.

It is, however, not yet possible to close the discussion on artificial differentiation. The treatment given to the topic so far has concentrated on outlining the effects and possible solutions to the problem. It still remains to deal with the means by which differentiation is achieved and to attempt to reconcile measures aimed at the eradication of the practice with the theory of advertising control in general. It is therefore necessary, at this stage, to pick up the threads of the discussion of categories of unfairness in advertising.

Psychological Factors Bearing on Unfairness.

(i) *General.* The means by which advertising influences consumption patterns have been depicted as insidious forces preying on the consumer's psyche. Advertising, which superficially plays an informative role, is seen, in fact, as a manipulative device which creates a scheme of wants in the consumer by rearranging his motives. Purchases are induced not by the presentation of products which will satisfy existing needs in the consumer, but by appealing to his susceptibilities and subconscious drives. The process reveals the two principal characters in the marketing drama as, on the one hand, the consumer endowed with the comic features of a Thurberian caricature and, on the other, the advertiser enjoying all the pervasive influence of Orwell's Big Brother.⁶² The deception owes much to Packard's writings on motivational research in the 1950's and has been an underlying theme of many of the attacks mounted against advertising since that time.⁶³

Again, however, the absence of detailed research leaves the view open to question. Packard's depiction of managerial infallibility has recently been dismissed as a folk myth. It has been pointed out that market research data is incomplete and that advertisers do not know how to reach a given audience with any degree of accuracy.⁶⁴

A broader criticism of the line taken by Packard (among others) is that it assumes the inferiority of non-economic influences in purchasing decisions to purely economic factors such as the price, quality and usefulness of products. Purchases motivated by less tangible concerns are dismissed as being 'irrational'. These assumptions embody value judgments and are, therefore, neither a valid basis for the construction of a case against advertising nor a workable point of departure for the control of advertising abuses.⁶⁵ Put in a slightly different form, the argument is that values may be fictitious as perceived by the consumer but real as enjoyed:⁶⁶ advertising does not simply sell a product; it is, in the image which it creates, an integral part of the product.⁶⁷ Why is the quest for images evoked by advertising appeals any less acceptable than the pursuit of less ephemeral goals? Moreover, even the total replacement in advertising of imaginative appeals would ring no changes for facts themselves are not innocent--they are symbols shaped by the individual's preconceptions and can evoke

images just as potent as those created by the more intensive methods of persuasion.⁶⁸ Acceptance of this last point leads to the conclusion that if advertising is manipulative, a major source of the manipulation lies within the consumer himself, beyond the reach of the critic and the regulator.

Yet, this conclusion does not altogether dispose of the issue. Even if it is accepted that image appeals are not inherently undesirable or, at least, are not wholly avoidable, the question remains as to whether some limits should be imposed on their use. It might be asked in this regard whether they can be subjected to the same restrictions as are applicable to statements made in the informative context of advertising messages. A recent report prepared for the Federal Trade Commission⁶⁹ argues that this assimilation should be made--that there is no rational basis for distinguishing between misleading or unfair claims going to externals (such as product performance or price) and misleading or unfair claims as to product image.

The argument is presented in the context of an analysis which attributes four basic modes of communication to the advertiser. There is, first, appeal to the personal attitude in the consumer toward a particular brand. A consumer preference for, say, a particular brand of coffee because it tastes better is a personal attitude. Interpersonal attitudes are in evidence where the consumer is influenced in his purchase decision by (for example) his need to impress family and friends. Appeals to intrapersonal attitudes play on the consumer's perception of himself. If, for example, he perceives himself as a good housekeeper, a claim that the purchase of a particular brand of coffee is consistent with, or will enhance, that perception operates on an intrapersonal level. Finally, there are impersonal attitudes, which are susceptible to appeals such as convenience--that the local store stocks the particular brand, for example.⁷⁰ Put more succinctly, the distinction is that personal attitudes deal with the relationship of products to goals, impersonal with the relationship of conditions to goals, intrapersonal with the relationship of self to ideal self and interpersonal with the relationship of self to others.⁷¹

Claims directed to such matters as product performance, price and availability are subsumed under the personal or impersonal categories. Legal controls are, traditionally,

concentrated on these categories. Image appeals most frequently play on the consumer's self-concept and fall, therefore, within the inter- and intrapersonal categories.⁷² The argument is that whether the advertiser's appeal, in making a claim, is to personal attitudes or self-concept, the basic issue remains the same and that is whether the benefits delivered by the product do in fact match the expectations given to the consumer by the advertising.⁷³ A claim which causes changes in brand comprehension or attitude, while lacking a substantial basis for so doing, operates against the goal of an informed market place. It is unfair and should be prohibited.⁷⁴ A claim that a brand of toothpaste will make the user more popular or more sexually appealing should, according to the analysis, be treated no differently from a claim that it produces teeth 25 per cent whiter than any other brand or that it will prevent cavities.

The analysis advocates consistency and is, to that extent, appealing but the emphasis on consistency should not be allowed to pre-empt assessment of its adequacy in other respects. Its major flaw may well be that it threatens a misplaced emphasis in regulatory activity. It relies heavily on the proposition that misleading product information and misleading image appeals share the common element of untruthfulness. But there is also the equally pivotal factor of the potential of the claim to mislead. It might be argued that there is a functional distinction between the two types of claim--that, as a general rule, image appeals, even if untrue, are less likely to deceive than misinformation. Despite the advertising claims to the contrary, Ultra-brite is probably incapable, in the normal run of things, of having any perceptible impact on the love-life of the user. Yet, the claims can hardly be regarded as misleading. Most consumers have a sufficiently technical grasp of the facts of life not to be affected by the literal untruths propagated by the campaign.

If the crucial question is, as the analysis asserts, whether the expectations generated by the advertisement are fulfilled by the product, the formidable problem arises of determining, in each case, the extent to which the expectation is actively prompted by the advertising message and that to which it is a creature of the consumer's own perception of the message, a perception which will be shaded by his own fantasies, drives and experience.

It must, therefore, be concluded that persuasive

appeals cannot be treated on precisely the same footing as factual statements. As has already been seen, the true/false distinction which is applicable to the latter is unworkable in the case of the former. It is, therefore, necessary to search further for the deceptive potential in image appeals. What sort of harm can be inflicted on consumers by persuasive advertising?

(ii) *Artificial differentiation.* According to the analysis in the report to the Federal Trade Commission, the species of harm sought to be prevented is the disruption of an informed market place.⁷⁵ The goal envisaged is, in other words, the preservation of informed consumer choice as the foundation of competition. All advertising claims, including self-concept appeals, are disruptive if they work against this goal. With these points emphasized, the analysis can be seen as shading off into the case (already stated) against artificial product differentiation.

A coherent thesis thus begins to take shape. Self-concept or image appeals cannot realistically be treated in a vacuum. They ought not to be proscribed simply because they operate in the area of persuasion rather than in the realm of information. Nor should they be assessed solely by reference to the criterion of literal truthfulness for they may, while being literally untrue, be incredible and, therefore, incapable of misleading. However, like certain types of factual statement (such as incomplete comparisons and glowing descriptions of product characteristics which are in fact possessed by all competing brands) they can be--and frequently are--employed to disguise the functional identity of a particular product with competing brands.

If there is any difference in this respect between factual and imaginative appeals, it is one of degree rather than of substance. Image appeals are a particularly potent device for the creation of artificial differentiation, for two reasons. First, they are inherently ambiguous and ambiguity facilitates over-interpretation: since it is difficult to ascertain their meaning, they can be endowed by consumers with a significance beyond that of the express statements of which they are composed.⁷⁶ Secondly, they frequently have a greater emotional impact than claims expressly asserted; emotional appeals can swamp other relevant considerations associated with the purchase of a particular product.⁷⁷

The thrust of the argument here is, then, that the manipulative tendency of image appeals does not of itself afford acceptable moral grounds for the imposition of controls. But its regulation can be justified on economic grounds to the extent that it represents potentially the most effective means of distorting competitive influences in the market by fostering artificial differentiation.

If taken to extremes, however, this analysis is open to a charge of hair-splitting, for it might be regarded as achieving nothing beyond the substitution of one ground for proscribing image advertising (the economic factor) for another (the moral factor). If the result in either case is the total abolition of persuasive advertising, it hardly matters what theoretical postulates are advanced by way of support. The difficulty arises because the very purpose--the inevitable effect--of all persuasive advertising is to encourage consumers to purchase the advertised product in preference to others. Yet, persuasive appeals, by definition, relate to factors which are extraneous to the physical characteristics of the product being advertised. Accordingly, nearly all persuasive advertising is to some extent directed to the creation of artificial distinctions between competing products. This is the function of most modern advertising.⁷⁸

If image advertising is to be preserved at all, some limits must be set on its economic regulation. The only feasible way of doing this would be to focus regulatory activity on those industries where artificial differentiation was most prevalent and most disruptive. To this end, the prime targets for regulation should be identified by reference to such features as high levels of concentration, extensive brand proliferation and intensive advertising activity. Concentration of regulatory endeavours on industries exhibiting these characteristics would achieve both the theoretical reconciliation of the need to prevent economic disruption with the need to preserve a margin for the legitimate operation of persuasive advertising and meet the practical expedient that regulatory activity focus on those areas where the threat to competition is greatest.

(iii) *Exploitation.* It has been assumed so far that the species of harm flowing from persuasive appeals in certain situations is economic in nature. It remains to consider whether image advertising can inflict other forms of injury on consumers to an extent which would justify the

imposition of restrictions on its use. Again, it will be instructive at this point to return to the development by the Federal Trade Commission of categories of unfairness.

In ITT Continental Baking Co.,⁷⁹ the Commission alleged (*inter alia*) that in advertising its product Wonder Bread, respondents engaged in practices which were both deceptive and unfair. It was charged that the advertisements which were aimed primarily at children and which, in an animated sequence, showed a child visibly growing as he ate the respondent's product, tended to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying the bread as an extraordinary source of nutrients. The advertisements were also said to be deceptive and unfair in that they exploited the emotional concern of parents for the healthy growth and development of their children. In issuing its final order, the majority of the Commission found the advertisements to be deceptive on the ground that Wonder Bread is not an extraordinary source of nutrients nor is it the optimum contribution a parent can make to his child's nutrition during the formative years. It dismissed the charge of unfairness but was careful to stress that its ruling did not mean that unfairness could never be a ground of complaint against advertising of this nature. The basis for the dismissal was a technical one: the complaint as framed, instead of alleging unfairness as a ground independent of deception, in effect asserted that the claims were unfair because they were false. In reaching its decision, the Commission simply indicated that a charge of unfairness must be supported on grounds additional to, and independent of, deception. There remains, therefore, the very real possibility that the unfairness doctrine will be extended to cover psychological exploitation in advertising claims.

In J. B. Williams Co., Inc.,⁸⁰ the complaint alleged, in part, that respondent's advertising for its non-prescription stimulant, Vivarin, falsely claimed that Vivarin will make one more exciting and attractive, improve one's personality, marriage and sex life and solve other marital and personal problems. Vivarin's primary stimulative ingredient was caffeine and produced about the same effect as drinking two cups of coffee. The actual grounds of the complaint are not altogether clear. It seems that the allegation was that the claims were deceptive rather than that they were unfair (the complaint was actually proposed

prior to the Supreme Court decision in Sperry & Hutchinson Co., and to the Commission's ruling in Pfizer). On the other hand, the complaint did not expressly allege that the challenged claims were untrue--that taking Vivarin or drinking two cups of coffee would not produce (at least in some cases) some of the effects claimed. It seems that the principal thrust of the complaint was against the exploitation of emotional problems commonly suffered by women.⁸¹ The respondent accepted a consent order, with the result that the precise implications of the complaint were never worked out by the full Commission. However, on the basis of the majority opinion in ITT Continental Baking Co., it is quite possible that the unfairness doctrine would today support a similar complaint.

Both ITT Continental Baking Co. and J. B. Williams Co., Inc., insofar as they can be regarded as impliedly extending the unfairness doctrine to psychological appeals, raise the theoretical difficulties referred to earlier. There must be some limits imposed on the proscription of image advertising, if only for the reason that otherwise advertising control would be tainted by an undesirable degree of paternalism. It has been suggested that the likelihood of economic injury to consumers as a result of advertising claims should be a necessary prerequisite to intervention. Yet, economic factors were not a major consideration in either of these cases. The harm allegedly inflicted on consumers by the challenged claims were psychological.

The advertising claims in issue here can be distinguished, in at least one respect, from the normal type of image appeal. They did not simply play on consumer fantasies, but were directed at specific audiences with peculiar susceptibilities which they actively exploited. To that extent, they might be regarded as valid exceptions to the general proposition that image appeals--psychological advertising--should not be regulated solely on the basis that they are imaginative rather than informative. The difficulty lies not in recognizing the exception in isolated areas, such as children's advertising, but in setting limits on its application to other cases. In many instances it may simply not be possible to draw a workable distinction between exploitative claims and other forms of image appeal. The J. B. Williams case illustrates that the case against certain forms of children's advertising and that against the exploitation of neuroses are virtually indistinguishable. There are,

according to the Wonder Bread decision, grounds for protecting the emotional concerns of parents on the same footing as the susceptibilities of their children. It could, with very little ingenuity, plausibly be argued that most image appeals are exploitative and that, therefore, the exception constitutes the rule. Without necessarily decrying the case for intensive regulation in special areas such as children's advertising, the point might be made that, in the absence of objective criteria for drawing the distinction, the extension of the unfairness approach into psychological advertising which does not have direct economic implications may lead the Commission onto dangerous ground.

Social Factors Bearing on Unfairness. It might finally be asked whether there is any wider ethic--extending beyond the considerations canvassed so far--by reference to which the undesirable effects of advertising claims and techniques can be tested.

It is arguable that much advertising is undesirable not so much because it creates needs, but because it urges immediate satisfaction of those needs. It is undesirable in terms of the social structure because it has a corruptive effect on human values:

Advertising creates obnoxious values to impel the American into becoming a 'virtuoso consumer'. Advertising has single-handedly transformed the average American into a passive, lazy, greedy, sensual, wholly-minded, materialistic being, culturally deprived, whose head has become a TV tube and whose motto is 'CONSUME'.⁸²

The modern advertisement preaches the doctrine that the acquisition of objects will gratify basic inner needs and aspirations, thereby prescribing externally derived solutions for life's problems. It is populated by a stereotype concerned with external motivation to the exclusion of higher aspirations and the more diverse forms of human experience. Moreover, its range of vision is confined to the white, suburban middle-class way of life, which it holds out, to the frustration of those who are not of that category, as the ideal to be ceaselessly sought after.⁸³

Modern media, particularly television, have made available to advertisers a large and captive audience which

can be exposed to very sophisticated presentations of product at very frequent intervals. At what point this becomes a socially unacceptable form of psychological conditioning is the essence of the debate. Some, like Packard and Galbraith, see advertising as artificially contriving many of today's consumer wants. This view is probably overstated because in a sense production almost always precedes and creates the corresponding wants. Presumably, there was not a widespread demand for bread, the staff of life, until someone produced it and its virtues were made manifest.⁸⁴ Some, like Huxley, see modern advertising and the conditioning it involves as one of the fore-runners of the Brave New World.⁸⁵ One of Huxley's prescriptions for the ill, however, namely, close legislative regulation of "psychological" advertising etc.,⁸⁶ may, on another view, itself involve the imposition of a value system, determined by the State, on the consumer which is equally destructive of individual freedoms. According to Hayek at least,⁸⁷ we may simply be setting off for the Brave New World by another route. Some, like Boorstin, argue that the world of images and illusions created by advertising and the media generally are alienating the individual from reality.⁸⁸

Others again, like J.A.C. Brown,⁸⁹ argue that modern advertising is not nearly as great a social evil as critics assert. Brown argues that a man's essential or "nuclear" personality is established at an early age and the kind of "conditioning" involved in advertising can rarely change this. It can only encourage him to indulge already existent psychological needs etc., and what is wrong with this?⁹⁰

An interesting and rather unorthodox thesis in defence of modern advertising has recently been developed by an Italian writer, Giancarlo Buzzi.⁹¹ Buzzi argues that advertising, so far from creating social values, simply reflects the values that already exist in society.⁹² Those who wish to regulate advertising are really protesting (in a futile way) at the social values which it reflects:

Advertising proposals made by those who want advertising to be truthful and honest -- purely informative -- are, in the last analysis, only compromises....⁹³ The compromise solution to the moral problems of advertising is dubious from every point of view, and especially the political one. Advertising that dissociates itself from the

values of the society in which it acts -- here neo-capitalism with its faulty competition, its economy and mythology of welfare, its strong horizontal and vertical social satisfaction -- and at the same time tries to sell goods that are a direct result of this context, supports only the negative aspects of that society. It does so by allowing the value of the society to operate more insidiously and to persist longer....⁹⁴

We can rightly ask the advertiser to respect individual values in his messages if we can accept the fact that the individual we speak of is no longer the one delineated by humanistic culture.⁷ Moral complaints against advertising, based on individualistic ethics and making accusations against an instrument that works in a socially valued ethic, can only create confusion. To consider these complaints, advertising would have to reject the values of society, deny its own history, promote the reform of individualistic ethics, or revolutionize existing society.⁹⁵

Buzzi argues that advertising is neither licit nor illicit, good or evil, in itself, but only relative to a context or system of values.⁹⁶ He argues that the true social function of advertising should be seen as the wearing out, the consumption, of the values of the so-called "neocapitalist" system:

Man must go on consuming the goods of the present, and many of those of the future; he must go on consuming the doubtful comfort, doubtful beauty, doubtful justice, and other new aspects, marked and insidious, of privilege. Man is engaged in a race that can end in his victory or his destruction. He must consume wildly, consume so frantically that he undoes the technocrat's arrogance, an arrogance most of us have assumed as our own. Man must show the technocrat how impotent he really is; the technocrat must have undeniable proof of his inability to 'satisfy' in the serious sense of the word...⁹⁷ Informed, courageous advertising men also look to this new man when they work to fulfill all the promises of technocratic society, helping to bring the moment of its death closer....⁹⁸

On this view, advertising will destroy the value system upon which it is premised. The system destroys itself. A revolution in social values cannot be legislated. We must wait for the apocalypse.

A difficulty with all these views of the role of advertising in the formation of social values, and particularly of consumer wants, is that they tend in each case to be a priori in nature. Precisely what impact advertising has in this respect, and thus on the bargaining process in the consumer marketplace, can only be determined by detailed empirical research. So far, speculation and dogma have been accorded a priority.

Conclusion

In drawing together all of the considerations outlined above, it can be said that there is a strong case for extending controls over advertising beyond the traditional prohibition of misleading statements. The implementation of a philosophy of information would lend coherence to innovative measures which might be adopted. Yet the philosophy, at least in its application to advertising, must be a limited one -- it must take account of the form and function of modern advertising and of the limits to the ability of advertising to operate as an educative device. Nor should it proceed solely from a basis of preconceived notions as to what is desirable information and what is not -- advertisers should remain free to persuade and consumers to be persuaded by whatever considerations, 'rational' or 'irrational', of which they choose to take account. Additional information in advertising should only be insisted on where its absence would be likely to result in positive harm.

On one level, such harm might result because the information is so important that its omission would make express claims misleading. On another level, species of harm might emerge from the application of the concept of fairness in advertising. Advertising may properly be considered unfair where claims are made which lack a reasonable basis and, in exceptional cases, where they threaten social disruption or emotional injury by exploiting the susceptibilities of the audiences to which they are directed. It has been indicated that research is needed to determine when such cases might arise. With regard to artificial product differentiation, there is a case for regulating advertising which in-

flicts economic injury on consumers either in the immediate form of burdening them with unwanted purchases or in the more far-reaching sense of displacing price competition as a regulatory force in the market. The case here is weakened both by lack of agreement as to the extent of the harm caused by artificial differentiation and by the absence of proven measures for reducing the evil at its source. Detailed research is also required in both these areas. Finally, the case for regulating advertising on purely social grounds is a shaky one, for it rests on individual preconceptions of desirable social and aesthetic values. Therefore, other than in exceptional circumstances, regulation should not be extended in this direction.

Our view is that a single statutory approach or framework of a prohibitory nature can be fashioned to accommodate the objective of preventing deceptive advertising, a limited objective of improving the informational quality of advertising and, in exceptional cases, the objective of outlawing unacceptable forms of psychological exploitation (e.g. some kinds of children's advertising). Other objectives advanced for advertising regulation, e.g. the prevention of social manipulation, are both too ill-defined and lacking a firm enough social consensus to attract legislative control at this time. Yet other objectives, e.g. the elimination of artificial product differentiation, may be better addressed not in a general prohibitory statutory framework directed specially to advertising but through anti-trust laws or special tax policies where underlying problems of market structure can be dealt with more directly.

One other objective which we have not yet mentioned but which might appropriately be accommodated in the kind of statutory framework we have in mind, although not involving advertising explicitly, is gross inequality of bargaining power or, to use the legal concept, unconscionable transactions. With the increasing complexity of products and services, making comparative product and price evaluations difficult, the increasing complexity and thus intelligibility of legal transactions following the advent of consumer credit, the aggressive marketing of consumer credit, eroding consumer circumspection in shopping decisions, the development of highly sophisticated marketing and promotional techniques generally, the problems of consumer access to grievance - solving mechanisms, and increasing concentration in many markets, the differential in the sophistication and effectiveness that

merchant and consumer bring to the bargaining process continues to widen. The F.T.C. has invoked the fairness doctrine to police certain kinds of unconscionable transactions and in Chapter IV of this paper, dealing with private law redress, we examine this supplementary objective of policing residual unconscionability in the market place in some detail.

The chapter which immediately follows will be concerned with the Canadian federal legislation. It has already been noted that the regulatory perspective in Canada is a limited one. The focus, at least on the federal level, is almost exclusively on the prohibition of 'misleading' claims made in the informative area of advertising messages. The criminal law is the principal regulatory device. Two questions therefore arise: first, whether the criminal law is an appropriate tool even for a limited form of advertising regulation and secondly, assuming that it is, whether existing criminal sanctions can be adapted either to perform the present, limited, task more effectively or to enforce a broader range of statutory objectives.

I:Footnotes

- 1 See, e.g., the thrust of ss 36 and 37 of the Combines Investigation Act R.S.C 1970 C-23; also that of ss 1, 11 and 14 of the Trade Descriptions Act 1968 (U.K.).
- 2 Firestone, The Economic Implications of Advertising (1967) 2-3; Cohen, "Misleading Advertising and the Combines Investigation Act" (1969) 15 McGill Law Journal 622, 626. It should be noted that the distinction is sometimes extremely difficult to apply. It is, on occasion, hard to determine where the informative element of an advertisement ends and the persuasive begins. It is, however, a useful distinction and will be adopted here as a point of reference.
- 3 Ibid.
- 4 Canada, Department of Consumer and Corporate Affairs, Misleading Advertising Division, Trade Practices Branch, Position Paper (unpublished, December 27, 1973), 1-3. See also Law Reform Commission of Canada, Studies on Strict Liability (1974) 75-6, where it is pointed out that the consumer needs protection against dishonesty and deceit in the seller, against manipulation and the stultification of freedom of choice by the advertiser and against advertising pollution by the media; Canadian law satisfies only the first of these needs. Cf. the position in the U.S. where both the informative and the persuasive aspects of any advertisement can be questioned by the Federal Trade Commission under s.5 of the Federal Trade Commission Act 38 Stat. 717 (1914); 15 U.S.C. 41; 52 Stat. 111 (1938); see Cohen, op.cit., Note 2, loc.cit.
- 5 See, e.g., Alexander, Honesty and Competition (1967); "Federal Regulation of False Advertising" (1969) 17 University of Kansas Law Review 573; Howard and Hulbert, Advertising and the Public Interest (Staff Report to the Federal Trade Commission, 1973), 5.
- 6 Note, "Developments in the Law: Deceptive Advertising" (1967) 80 Harvard Law Review 1005, 1026.
- 7 Buzzi, Advertising: Its Cultural and Political Effects (University of Minnesota Press, 1968), 129n.

- 8 Boorstin, The Image (1962) 216-7, quoted in Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill Law Journal 263, 282.
- 9 Buzzi, op.cit., Note 7, 130n.: "We are saved from a few superlatives, but to what end if they are replaced by positive adjectives or equally boring and unhappily chosen nouns?".
- 10 An example, in the FTC context, is the Geritol episode. In J. B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967), an affirmative disclosure order issued by the Commission against the respondent in respect of advertising claims made for their product, Geritol, was upheld by the Court of Appeals. The advertisement claimed that the condition of tiredness and run-down feeling may be caused by iron deficiency and, if it is, Geritol would give fast relief. In short, Geritol is good for iron deficiency anaemia. It was found that the advertisements created the false impression that iron deficiency anaemia causes most tiredness. Subsequent to this decision, the Geritol copywriters resorted to humour, producing a series of ardent husbands fended off by haggard wives because of their fatigue. Geritol transformations produced women sexily clad in pyjamas and slinky gowns, or cast as mountain nymphs brimming with desire. The accompanying copy included such claims as: "The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them...but it's a medical fact that many of the millions of people who have iron-poor blood...are tired and need Geritol. It could be...you're tired". The new advertizement, in nominally complying with the affirmative disclosure order, did little more than reiterate, in subtler form, the very claim at which the Commission had taken offence. The Commission reacted and a battle of semantics with the respondents ensued. It was almost a year before proceedings were instituted for violation of the order. See Keeton and Shapo, Products and the Consumer: Deceptive Practices (1972), 586n.
- 11 See Howard and Hulbert, op.cit., Note 5, loc.cit.
- 12 See the discussion, infra, of Alberty v. FTC 182 F.2d 36 (D.C. Cir. 1950), cert. denied 340 U.S. 818 (1950).

- 13 Cohen, op.cit., Note 2, 2; Firestone, op.cit., Note 2, 5.
- 14 Howard and Hulbert, op.cit., Note 5, loc.cit.
- 15 Winter, The Consumer Advocate Versus the Consumer (1972), 10; for similar views, see Stigler, "A Sketch of the History of Truth in Teaching" (1973) 81 J. Pol. Ec. 491 and Levitt, "The Morality of Advertising" (July-August 1970) Harvard Business Review, 84. For a reply to Levitt see Capitan, "Morality in Advertising -- A Public Imperative", in Lazer and Kelley, Social Marketing (Irwin, 1973) at p. 415. For a discussion of the shortcomings of information as a philosophy on which to develop advertising control, see Trebilcock, op.cit., Note 8, 277-86.
- 16 See Keeton and Shapo, op.cit., Note 10, 59.
- 17 One attempt has been made at compiling a list of the features which should characterize a desirable advertisement. It is suggested that it should fulfil six requirements: timeliness (i.e., whether the ad reaches the consumer in time for him to purchase a particular brand at the moment he needs it); intelligibility; relevance (i.e., to what extent does the ad inform the consumer of his desired benefits?); completeness (i.e., does the ad provide sufficient information for the consumer to choose a particular brand); truthfulness, and ability to reach a target audience: Howard and Hulbert, op.cit., Note 5, 80-7. The application of these standards may assist in sorting out desirable from undesirable claims, but the real testing ground will be the areas of relevance and completeness. These areas are haunted by the familiar difficulties of what are the consumer's benefits; should they be dictated to him; and what is relevant information (a question particularly apposite where the purchase is not made to satisfy "urgent" needs).
- 18 See Firestone, op.cit., Note 2, 5; Buzzi, op.cit., Note 7, 28ff.
- 19 See Keeton and Shapo, op.cit., Note 10, 287.
- 20 Winter, op.cit., Note 15, 8: "[There] is a conflict between the goal of accuracy and the goal of communication with the consumer. Accuracy pushes toward highly technical language not easily comprehended by a layman...while

the need to communicate calls for ordinary words which often cannot accurately portray the intended meaning."

- 21 See Roseman, Consumer Beware! (1974) 223, quoting from an interview with Ralph Nader.
- 22 Federal Trade Commission Act 15 U.S.C. s. 45(a) (1970).
- 23 Fair Trading Act 1973 (U.K.), s.34.
- 24 15 U.S.C. s.45(a) (1970).
- 25 The phrase was added in 1938 as part of the Wheeler-Lea amendments (52 Stat. 111 (1938)). It was designed to overcome the ruling in FTC v. Raladam & Co. 283 U.S. 643 (1931), where it was held that the Commission only has authority to regulate deceptive acts or practices which affect competition. Moreover, prior to the amendments, the Act prohibited only unfair methods of competition and deceptive acts or practices. The amendments added the epithet "unfair" to the latter part of that phrase: see "Developments in the Law: Deceptive Advertising", op.cit., Note 6; MacIntyre and Volhard, "The Federal Trade Commission and Incipient Unfairness" (1973) 14 George Washington Law Review 407, 430-2; Thain, "Consumer Protection: Advertising: The FTC Response" (1972) 27 Business Lawyer 891, 897-8.
- 26 143 F.2d 676 (2d Cir. 1944).
- 27 Ibid. 679-80, quoting in part from Aronberg v. FTC 132 F.2d 165, 167 (7th Cir. 1942).
- 28 Charles of the Ritz Distributors Corp. v. FTC 143 F.2d 676, 679 (2d Cir. 1944).
- 29 For a full discussion of FTC decisions prior to 1970, see Note, "Developments in the Law: Deceptive Advertising", op.cit., Note 6; Alexander, op.cit., Note 5; Millstein, "The Federal Trade Commission and False Advertising" (1964) 64 Columbia Law Review 439. These works, while now dated, are useful in tracing the development of FTC control over advertising.
- 30 R.S. C 1970 C-23.

- 31 (1971) 22 D.L.R. (3d) 51. The point has not yet received the attention of the Supreme Court and cannot therefore be regarded as being finally settled. Furthermore, the various judgements of the Court of Appeal are not altogether clear on the point. Clement J. seemed to indicate a distaste for the credulous man test, but expressly agreed with the trial judge's approach--the trial judge had cited the test with approval. Kane J. held that the reasonable man test was not the appropriate criterion for assessing the capacity of an advertisement to mislead. But he did not expressly adopt the credulous man approach.
- 32 See the new s.36(5) provided for in Bill C-2 (1974), s.18(1).
- 33 405 U.S. 233 (1972).
- 34 Ibid., 244.
- 35 Ibid., n.5.
- 36 E.g., Pfizer, Inc. (1970-73 Transfer Binder) Trade Reg. Rep. s.20,056 at 22,029 (FTC 1972); Firestone Tire & Rubber Co. (1970-73 Transfer Binder) Trade Reg. Rep. s.20,112 at 22,069 (FTC 1972) (final order to cease and desist); Benton & Bowles, Inc. 3 Trade Reg. Rep. s.20,346 at 20,213 (FTC 1973) (final acceptance of consent order).
- 37 Firestone Tire & Rubber Co. (1970-73 Transfer Binder) Trade Reg. Rep. s.20,112 at 22,069 (FTC 1973) (final order to cease and desist); affirmed Firestone Tire & Rubber Co. v. FTC 481 F.2d 246 (6th Cir. 1973).
- 38 General Motors Corp. et al. (1970-73 Transfer Binder) Trade Reg. Rep. s.20,120 at 22,102 (FTC 1972) (proposed complaint); 3 Trade Reg. Rep. s.20,747 at 20,600 (FTC 1974) (consent order accepted).
- 39 Fedders Corp. (1970-73 Transfer Binder) Trade Reg. Rep. s.20,120 at 22,102 (FTC 1972) (proposed complaint); 3 Trade Reg. Rep. s.20,825 at 20,691 (FTC 1975) (final order to cease and desist).

- 40 (1970-73 Transfer Binder) Trade Reg. Rep. s.20,056 at 22,029 (FTC 1972).
- 41 See, e.g., Firestone, op.cit., Note 2, 20-1, 83; Liebson, "Advertising, Monopolistic Competition and the Consumer" (Student Essay, McGill University, Faculty of Law 1971) in Trebilcock and Zylberberg, Materials on Consumer Law (1974) 111,112; Walker, An Outline for the Rationale of Enforcement Priorities of the Misleading Advertising Division (unpublished paper for the Misleading Advertising Division, Trade Practices Branch, Department of Consumer and Corporate Affairs) 1-2 (hereinafter referred to as 'Position Paper No. 2').
- 42 See, e.g., United Kingdom, Report of the Monopolies Commission on the Supply of Household Detergents (1966).
- 43 Position Paper No. 2, op.cit., Note 41, 2.
- 44 Galbraith, The New Industrial State (2nd ed., 1971), 209. Buzzi makes the point rather more apocalyptically: "The most serious contradiction, the one that really puts the technocrat on trial is that while his lyrical exaltation of scientific knowledge should induce him to be extremely concrete, particularly regarding the goods he produces, distributes and consumes, he moves instead amid only abstractions and the ashes of myths" (op.cit., Note 7, 7-8).
- 45 See Roseman, op.cit., Note 21, 128 (the world can be made to beat a path even to the door of an advertiser who has not built a better mousetrap): "Note that often the product itself doesn't change. Only the ad claims do. Once the ad war starts, it's like an arms race that everyone wants to stop, but no one knows how. While the price of the mousetrap goes up, the mousetrap often stays exactly the same. The mousetrap buyer subsidizes the advertising, but gets nothing in return for it--just a bunch of inflated and meaningless claims." See also the analysis of the household detergent market in the United Kingdom undertaken by the Monopolies Commission, op.cit., Note 42, paras 91, 94, 116. In para. 91 it is noted that the manufacturers' selling costs accounted for nearly a quarter of what the consumer paid for the product, the greater part of these costs representing expenditure on advertising, promotion and market research.

- 46 Ibid., para. 116.
- 47 Ibid. See also Liebson, op.cit., Note 41, loc.cit.; Note, "Developments in the Law: Deceptive Advertising", op.cit., Note 6.
- 48 See the views of Professor Borden, quoted in Firestone, op.cit., Note 2, 80, 84.
- 49 Posner, Economic Analysis of Law (1972) 126-7.
- 50 See the discussion, infra, of the complaint issued by the Federal Trade Commission against four leading manufacturers of ready-to-eat breakfast cereals: Kellogg Co. et al. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,898 at 2,915 (FTC 1972).
- 51 United Kingdom, Report of the Monopolies Commission on Supply of Household Detergents, op.cit., Note 42.
- 52 Position Paper No. 2, op.cit., Note 41, 2-3.
- 53 Galbraith, op.cit., Note 44,, 201. See also The Affluent Society (2nd ed., 1969)
- 54 Galbraith, The New Industrial State, ibid.
- 55 Galbraith, The Affluent Society, op.cit., Note 53, 143.
- 56 Op.cit., Note 50.
- 57 Kellogg Co. et al. 3 Trade Reg. Rep. s.20,529 at 20,460 (FTC 1974).
- 58 Op.cit., Note 42, para 116.
- 59 United Kingdom, Report of the Monopolies Commission on the Supply of Ready Cooked Breakfast Cereal Foods (1973), paras 72 ff.
- 60 Op.cit., Note 42, paras 125-6.
- 61 Op.cit., Note 59, para 102.
- 62 Packard, The Hidden Persuaders (1957) 4-5. The most

vivid illustration of the thesis is to be found in the now defunct televised cigarette commercial. Some examples have been catalogued:

- (a) The Old Gold filter man is an 'independent guy' who does not 'follow the crowd' or 'care what's being done'...He can usually be found outdoors in clothing that ranges from casual to offbeat.
- (b) Stylishly clad, attractive female models review progress of their own sex during the past century, observing 'you've come a long way, baby' (Virginia Slims).
- (c) A series for L&M rhapsodizes about the L&M moment, 'When there's a moment just for the two of you'. One such occasion is after a party; another is at the conclusion of a hectic day in suburbia attending to such chores as a car wash, the family laundry and grocery shopping. On these and other 'L&M moments', attractive young couples snuggle up to one another and light an L&M.
- (d) The Silva Thins people...delivered the message that 'Cigarettes are like women. The best ones are thin and rich. Silva Thins are thin and rich.'

quoted in Keeton and Shapo, op.cit., Note 10, 586n.

One of the more amusing examples of the operation of motivational research cited by Packard is the exploration, on behalf of manufacturers of instant cake-mixes, of why housewives enjoy baking. It was concluded that the cake is heavily symbolic and that baking represents the act of giving birth, so that when a woman bakes a cake for her family, she is symbolically presenting the family with a new baby. The vulgar euphemism, "bun in the oven", was referred to as supporting this thesis (77).

- 63 The manipulative effects of psychological appeals can be used to a number of ends. One is to induce a decision to purchase. Another is to induce the purchase of a particular brand. (In the latter sense, psychological appeals can be seen as one of the means of achieving artificial differentiation--the cigarette advertisements discussed in note 62 supra well illustrate the process.) The process by which a producer creates artificial differentiation between his own products has been called "positioning". It is interesting to note the prediction,

made in 1972, that marketing in the 1970's would be dominated by companies that compete with themselves by launching multiple entries in the same product class, each advertised with a different image to appeal to different types of buyer (Wall Street Journal, 13 December 1972, reproduced in Rau, Business Torts (1974), Supplement 11, 17). The prediction has been at least partially fulfilled: see Roseman, op.cit., Note 21, 5: "If you don't like Bufferin, try Excedrin--both headache remedies are made by Bristol-Myers. Same with Pepsodent, Stripe and Close-up toothpastes--all products of Lever Brothers. And if you can't stand the taste of Sanka, try Brim--both decaffeinated brews come from General Foods."

- 64 Howard and Hulbert, op.cit., Note 5, 30. Packard himself catalogues criticisms which indicate the fallability of motivational research and some of the errors committed in the course of its application: the tendency to regard it as a panacea for all marketing problems, the unquestioned borrowing from clinical psychiatry and application of such flimsy diagnostic tools as the Rorschach test and the tendency to draw too hastily conclusions about mass behaviour from small samplings of test results (op.cit., Note 62, 247).
- 65 Howard and Hulbert, op.cit., Note 5, 53. See also Demsetz, "The Technostructure Forty-Six Years Later" (1968) 77 Yale Law Journal 802, 815 where, in a review of the New Industrial State, it is argued that all wants are learned (not innate) and that the individual should be free to choose how and where he acquired his wants: "The free society keeps open the avenues of persuasion and it invites his citizens to walk along those paths in an attempt to influence their lives and those of their children." Wants should not be belittled because they are artificially contrived.
- 66 See Trebilcock, op.cit., Note 8, 263, 279, n.31.
- 67 See Leff, "The Cultural and Social Impact of Society on American Advertising" (1970) Law and the Social Order 397, 400. Professor Leff underscores the point in his conclusion: "Remember, if Achilles had heeded only the Ralph Nader kind of advice, when given his famous choice between a long-and-comfortable and a short-and-glorious life, he would have gone home, first wrapping his heel

in a rolled-up copy of Consumer Reports" (at 401).

- 68 Buzzi, op.cit., Note 7, 33-4.
- 69 Howard and Hulbert, op.cit., Note 5, 50-1, 54.
- 70 Ibid., 39.
- 71 Ibid.
- 72 Ibid., 53.
- 73 Ibid., 53-4.
- 74 Ibid.
- 75 Ibid., 50-1, 53.
- 76 Alexander, "Federal Regulation of False Advertising",
op.cit., Note 5, 573, 583.
- 77 Ibid.
- 78 Travers, "Forward to a Symposium on the Federal Trade
Commission" (1969) 17 University of Kansas Law Review,
551.
- 79 3 Trade Reg. Rep. s.20,464 at 20,372 (FTC 1973);
reconsidered 3 Trade Reg. Rep. s.20,495 at 20,421
(FTC 1973).
- 80 (1970-73 Transfer Binder) Trade Reg. Rep. s.19,671 at
21,720 (FTC 1971) (proposed complaint); (1970-73
Transfer Binder) Trade Reg. Rep. s.20,039 at 22,024
(FTC 1972) (consent order accepted).
- 81 Isaacs, "Psychological Advertising: A New Area of FTC
Regulation" (1972) Wisconsin Law Review 1097, 1103-4.
- 82 Millstein, op.cit., Note 29, 448.
- 83 Jones, "The Cultural and Social Impact of Advertising on
American Society" (1970) 8 Osgoode Hall Law Journal 65,
69 ff.

- 84 See note 65 above.
- 85 Aldous Huxley, Brave New World Revisited.
- 86 Ibid., at pp. 109, 110 (Perennial Library ed.).
- 87 Hayek, The Road to Serfdom (Phoenix ed.) p. 273.
- 88 Boorstin, op.cit., Note 8: A world is created where "the Grand Canyon itself [becomes] a disappointing reproduction of the Kodachrome original" (at p. 25).
- 89 Brown, Techniques of Persuasion, (1963).
- 90 Ibid., chap. 7. Martin Mayer, Madison Avenue, U.S.A. (Harper, Row), argues a similar thesis: "Advertising is the wind on the surface, sweeping all before it when it blows with the tide but powerless to prevent a shifting of greater forces" (at p. 312).

Mayer also argues, rather more dubiously, that modern advertising finds a justification in the concept of an "added value":

"Whatever a benefit is promised from the use of a product, and the promise is believed, the use of the product carries with it a value not inherent in the product itself... The fact that the value is fictitious as perceived by the consumer does not mean that it is unreal as enjoyed by the consumer. He finds a difference between technically identical products because the advertising has in fact made them different" (at p. 311). "Many people will object that advertising creates 'false' values for a product, but in an economic context, it is unimportant whether a use value enjoyed by a consumer is true or false. Outside standards of judgment cannot be applied to assess the reality of private gratifications. The history of human vice indicates that values most widely regarded as false will always seem real enough to command a price in the market place. The truth or falsity of advertising values is a matter of individual opinion, not a subject for objective analysis" (at p. 315).

- 91 Buzzi, op.cit., Note 7.

- 92 Brown op.cit., Note 89, at pp. 157, 310 et seq., and Mayer op.cit., Note 90 at pp. 315 et seq. argue the same point.

The point carries some force. The principal thesis of Thorstein Veblen in The Theory of the Leisure Class, written in 1899, revolves around his concepts of "pecuniary emulation", "conspicuous consumption" "the pecuniary standard of living" and "pecuniary canons of taste". Veblen complained, in much the same terms as modern writers such as Galbraith, Fromm, Packard, etc., about consumption for status. The paraphernalia of status may have been a little different -- large mansions, liveries, servants, banquets, hunting, elaborate dress, etc. -- but the psychology seems to have been the same. Veblen argues that the desire to consume for status is in fact traceable to the predatory instincts of ancient man. Certainly, it seems long to precede the advent of modern advertising. Buzzi, op.cit., Note 91, argues that what has made the consumption ethic more prominent today is not advertising but the fact of affluence itself. Modern technology has enabled people to indulge their desire to consume more easily than formerly.

- 93 Buzzi, op.cit., Note 7, at p. 28.

- 94 Ibid., at pp. 31, 32

- 95 Ibid., at p. 124.

- 96 Ibid., at p. 140.

- 97 Ibid., at p. 137.

- 98 Ibid., at p. 141.

Others have seen the other end of advertising in other ways. Galbraith in The Affluent Society op.cit., Note 53, writes (at p. 161):

"In a society where virtuosity in persuasion must keep pace with virtuosity in production, one is tempted to wonder whether the first can forever keep ahead of the second. For while production does not clearly contain within itself the seeds of its own disintegration, persuasion may. On some not distant day, the voice of each individual seller may well be lost in the collective

roar of all together. Like injunctions to virtue and warnings of socialism, advertising will beat helplessly on ears that have been conditioned by previous assault to utter immunity. Diminishing returns will have operated to the point where the marginal effect of outlays for every kind of commercial persuasion will have brought the average effect to zero. It will be worth no one's while to speak, for since all speak none can hear. Silence, interrupted perhaps by brief, demoniacal outbursts of salesmanship, will ensue."

Marshall McLuhan in Understanding Media, (Signet ed.) at p. 202 states: "When all production and all consumption are brought into a preestablished harmony with all desire and all effort, then advertising will have liquidated itself by its own success."

This view is, of course, inconsistent with the norm of expanding production which will always require new wants to be contrived to consume the additional consumption.

II. CRIMINAL LAW CONTROL OF MISLEADING ADVERTISING

Introduction

Many jurisdictions still rely heavily on the criminal sanction as a means of enforcing misleading advertising legislation.¹ There has recently been a trend, at the provincial level in Canada, away from this position,² but it still holds true for the major provisions, Sections 36 and 37 of the Combines Investigation Act.³

The aim of this chapter is to examine some of the difficulties which flow from the indiscriminating application of the criminal law to legislation of this kind and to assess the adequacy of the criminal sanction as a means of controlling misleading advertising practices and thereby of protecting consumers. The discussion will be specifically oriented toward Sections 36 and 37 of the Combines Investigation Act,⁴ but most of the points which emerge will apply equally to any misleading advertising legislation which is based on the criminal law approach.

It is necessary, at the outset, to distinguish the several forms which a misleading advertising claim can take. It can be a deliberate, fraudulent mis-statement, a mis-statement which occurred as a result of negligence on the part of someone within the advertiser's business structure or it can, in some cases, be entirely accidental, occurring without any fault on the part of the advertiser. The scheme of the following discussion will be to examine the criminal approach from four angles--the nature of the conduct at which the legislation is directed, the nature of the offence, the nature of the offender and the nature of the sanction. The drift of the argument will be that, in the absence of fraud on the part of the advertiser, the criminal law is ill-fitted for a primary role in the regulation of misleading and unfair advertising. This is not to say, of course, that the criminal approach has been totally ineffective. The extent of the operations of the Misleading Advertising Division under the Combines Investigation Act clearly indicates that it has not.⁵ The point is, rather, that the criminal sanction is, in this context, a clumsy regulatory device and that there are better ways of dealing with the problem. The criminal sanction should continue to be invoked in situations involving fraud and negligence and as a support measure to be in-

voked in the event of breach by an advertiser of other forms of order.

The Nature Of The Conduct

The concentration of the enforcement activities of the federal authority in Canada has, to date, been almost exclusively on printed advertisements.⁶ There has, therefore, been little occasion to test the limitations of criminal procedure and the penal sanction in dealing with the various forms of conduct which may be said to constitute misleading advertising. This is because the written word is a medium with which the lawyer is well acquainted. The traditional procedures are equipped for the task of assessing the truth or falsity of printed statements. Television, however, gives rise to more complex problems. The televised advertisement is an amalgamation of spoken word, printed word and visual image. In view of the volume of television advertising,⁷ it is imperative that it be brought under legal control, yet there must be some doubts as to the ability of existing criminal procedure to cope with the medium. The more blatant cases will, doubtless, present few problems, but one can foresee difficulties in satisfying a court beyond reasonable doubt that, for example, a particular camera angle gave a misleading impression of the size of the product, that a particular shade of lighting gave a misleading impression of the quality of the product, that a particular vocal inflection gave a misleading impression of the nature of the product or that all or some of these factors in combination constituted a misleading advertising claim.

Yet, it is not only the physical features of certain types of advertising which might create problems for the criminal law. It has already been seen that legislative intervention in Canada has, to date, been limited to claims made in the informative area of advertising messages. There has been little attempt to control image appeals or to move beyond considerations bearing on the truth or falsity of advertising claims. It has been seen that there is a case for extending control over advertising which inflicts certain types of economic and psychological injury on consumers.

Any attempt to adapt the criminal law to fulfil these tasks would be misconceived. The exercise is, in this context, not geared to literal factors. The traditional

objective tests based on the distinction between truth and falsity are largely inappropriate. The concern is more often with the irrelevance of a claim than with its untruth; is more with indirect appeals which shape attitudes than with direct statements which induce purchase. The criteria for ruling on the nature of such appeals would need to be behavioural or economic rather than legal. Claims would be evaluated, not in isolation, but by reference to audience reaction.⁸ Existing criminal procedure is clearly not equipped to move in these directions. The requirement of proof beyond reasonable doubt does not square easily with the notion of behavioural evaluation.

The need to extend existing legal controls to cover the newer and more diverse types of advertising misconduct is apparent. However, a closer look at the sort of conduct to which control should be reaching highlights the clumsiness of the criminal approach. Decisions to move regulatory activity beyond the print medium or beyond claims made as part of the informative aspect of advertisements will require not merely amendments to the definition sections of the Act and increased budget allocations to the investigating authority. They will also require a fundamental reappraisal of the total legislative framework.

The remainder of this chapter will be devoted to an assessment of the criminal approach within the relatively limited range of present misleading advertising control.

The Nature Of The Offence

The view is widely held that the imposition of strict liability is essential if the criminal regulation of 'public welfare' offences such as misleading advertising is to be at all effective. It is said that if liability were not strict, the incidence of successful prosecutions would drop; there would be enormous difficulties in establishing, beyond reasonable doubt, the requisite intent in the accused for, even in relatively uncomplicated commercial organizations, the defendant himself is the only person in a position to know how and why the alleged offence occurred.⁹ Moreover, the underlying aim of the legislation is to prevent harm to the public--to protect the consumer from deception. This aim loses none of its urgency where the defendant is blameless, for the consumer suffers irrespective of how the misstatement occurred.¹⁰ As a general rule, the legislation, as

judicially interpreted, implies acceptance of these arguments. Most offences created by misleading advertising legislation have interpreted as imposing strict liability.¹¹

However, as has been recently indicated by the Law Reform Commission of Canada, there are certain distasteful aspects to strict liability.

Since it requires the element of intention to be overlooked, it imposes a similar treatment on cases which are significantly different. The morally culpable defendant is made liable on the same basis as is the morally blameless.¹²

This feature has several undesirable consequences. Most importantly, it may prove to be destructive of the criminal process. The moral stigma attached to criminal convictions is as much a part of the penalty as the sentence imposed by the court. It has a central role to play in the deterrent function of the criminal law. Yet, insofar as moral stigma can be said to attach to the moral type of strict liability offence, the morally blameless are unfairly stigmatized. To the extent that the public welfare offence lacks the customary stigma, the morally culpable offender is released from what should be an important consequence of his conviction. Either way, the inconsistency may encourage public disrespect for the criminal law as a whole and reduce the efficacy of the criminal sanction in other, perhaps more vital, areas.¹³

This consequence has special ramifications for misleading advertising control. At one extreme, the conduct prohibited amounts to a form of economic fraud, to outright lying by the advertiser to the customer. The deterrent effect of conviction in these circumstances arises not only out of the monetary penalty which is imposed, but also out of the stigma of having been convicted of lying. But once it is attempted to control in the same way mis-statements not deliberately made--to convict advertisers who were not lying--then not only does the stigma not operate in this case, but there is a real danger that it will begin to disappear even in cases where the advertiser is lying. Strict liability, therefore, poses a dilemma for the regulation of misleading advertising. If it is sought to maintain that misleading advertising is a form of lying, then the faultless cannot be penalized. But if the policy underlying the legislation does not justify the restriction of control to

cases of lying, then much of the value of the stigma may be lost. A definite commitment may have to be made to one or other of these two goals.¹⁴

Strict liability is said to be contrary to principles of freedom: to the extent that it results in the punishment of the morally innocent, it threatens oppression, for to punish a person who is without fault is to deny him a reasonable opportunity to comply with the law. A familiar argument in favour of strict liability is that even if it is unfair to impose criminal liability on a morally faultless defendant, such a policy is justified by the wider concerns underlying the legislation. Where there is a conflict between the individual rights of a particular defendant and the public interest the latter, being larger, should prevail.¹⁵

This view is too glib. It should be borne in mind that the protection afforded to the public by prohibitions such as those embodied in misleading advertising legislation is not an end in itself. It is simply a means to the end of establishing a framework within which the individual is free to live and act in his own fashion provided he does not infringe the equal rights of others to do the same. It is pointless "to establish such a framework at the expense of that very freedom the framework is trying to promote".¹⁶ Strict liability is, therefore, undesirable because it restricts unduly the freedom of the individual. There is no justification for that restriction.

It is sometimes asserted by proponents of strict liability, in answer to charges of unfairness and injustice, that strict liability is not really imposed in practice. It is said that prosecutors exercise discretion and usually proceed only against those persons whom they perceive to have actually been at fault.¹⁷

In fact, however, far from supporting the concept of strict liability, the argument forms the basis of a case against it. In the first place, if the point upon which it relies is accurate, then it runs against the principal contention in favour of strict liability that the doctrine is essential if the policies underlying public welfare legislation are to be properly implemented.¹⁸ Secondly, the argument admits a discrepancy between the law as written and the law as applied. In view of the penal consequences attached to these offences, the uncertainty and confusion threatened

by such a situation are highly undesirable.¹⁹ Finally, it can hardly be a justification for the doctrine that its practical application may result in a conviction turning not on due process of law, but on the whim of an administrator.²⁰

The Law Reform Commission of Canada's study of strict liability includes the results of an analysis of the files of the Misleading Advertising Division. The purpose of the analysis was to determine whether the Division exercised a discretion not to recommend prosecution in cases arising under Sections 36 and 37 where the contravention occurred as the result of a reasonable mistake of fact on the part of the defendant. The findings of the Commission corresponded with those of a similar study done some years previously of the enforcement of the Factories Act in the United Kingdom.²¹ It was initially discovered that a reasonable mistake on the part of an advertiser did, in some circumstances, have a bearing on the decision to prosecute.²² A closer analysis revealed, however, that the Division, in reaching its decision, was more likely to take account of factors other than reasonable mistake of fact. It tended to operate on a concept of blamelessness wider than that afforded by the traditional legal defences.²³ A tendency, although by no means an invariable practice, was discovered to take account of such factors as an advertiser's willingness to comply with the suggestions of the Division after a contravention had been brought to his attention, the treatment which an offending advertiser extended to dissatisfied customers and the advertiser's past history.²⁴ There is, in other words, a tendency not to prosecute an advertiser who has not really been dishonest. It was concluded that this tendency was justifiable, in view of the objectives of the Division, which are to prevent fraud to the public and to ensure truthful advertising. These objectives are considered to be best served by education and by enlisting the co-operation of advertisers rather than through an over-zealous policy of prosecution.²⁵

The results of the study lend support to the view that since the statutory offences are not treated in practice as imposing strict liability, there is no need for the retention of the doctrine in the regulation of misleading advertising. They indicate a need for reforms aimed at realigning the law as written with the law as applied.

It seems, at first glance, that the realignment

would be achieved by embodying an element of fault in the offences created by Sections 36 and 37--by basing liability on the concept of negligence. In fact, as will shortly be seen, the Law Reform Commission recommended that all regulatory offences be restructured in this way.

But the most interesting aspect of the study is that it seems to indicate that the implementation of such a proposal would not necessarily reflect the current practice of the Misleading Advertising Division. To the extent that the Division does take account of fault in deciding whether or not to prosecute, the considerations which it entertains frequently go beyond those which would be relevant to the issue of negligence at law. The behaviour of advertisers is looked at in a much wider context. The findings of the Commission seem, despite their hesitancy, to reveal an embryonic system of administrative control. The account taken of advertisers' compliance with Division guidelines and of their handling of customer complaints is an important clue to this point. Familiar earmarks of an administrative scheme are the discretionary power vested in the enforcement agency, the flexibility of the orders or directives which it can impose and the availability of criminal sanctions to be invoked against disobedience of an order or guidelines. These very features are, as the study indicates, already discernible in the modus operandi of the Division.

All of this suggests that a more appropriate solution to the difficulties associated with the doctrine of strict liability might lie in the formalization of the existing features of enforcement--in the amendment of the legislation to provide for more reliance on an administrative approach to misleading advertising control and in the relegation of the criminal sanction to a measure of last resort.²⁶

To return, however, to the more general case against strict liability. There is one final observation to be made which is, perhaps, the most fundamental. The doctrine, in terms of what it is meant to achieve, lacks theoretical foundation. It is at variance with traditional notions as to the ends of punishment. The retributive theory can, clearly, not be invoked to justify the punishment of a morally faultless defendant.²⁷ It is, similarly, difficult to understand what rehabilitative effect the criminal law can have on a person who, being morally innocent, has not, except perhaps in the most artificial of senses, deviated

from accepted norms of social behaviour.²⁸ The deterrent theory of the criminal law operates on two levels. It is said, firstly, that the punishment of an individual for his crimes will operate as a general deterrent to discourage others from engaging in the same line of conduct. The other important aim of punishment is, supposedly, to deter the individual punished from repeating in the future the conduct for which he was punished. The punishment of faultless persons under the doctrine of strict liability serves neither of these functions. So far as the theory of special deterrence is concerned, punishment cannot deter such a defendant from repeating a fault which, ex hypothesi, he has not yet committed.²⁹ Conviction on the basis of strict liability may make a defendant more careful in future, but this possibility only arises where the offence occurred because the defendant was less careful than he might have been. It cannot make any improvement in a man who is shown to have taken all reasonable care to prevent the proscribed occurrence.³⁰ It is, however, sometimes said that the punishment of an innocent individual may work as a general deterrent. Even if there was, in a particular case, nothing the defendant could do to prevent the occurrence, his punishment may serve to impress upon others the extreme care demanded by the law.³¹ But the injustice in punishing an innocent man simply as a means of setting an example for others is a consideration amply sufficient to dispose of that assertion.³²

It becomes clear, then, that adherence to any of the traditional theories of the criminal law implies acceptance of the view that punishment is justified--in a moral or a utilitarian sense--only where there has been an element of fault in the perpetration of the conduct proscribed. It appears that the lowest point at which the criminal law can effectively operate is liability for negligence.³³

The Law Reform Commission recommended the abolition of the doctrine of strict liability and the restructuring of all regulatory offences around the concept of negligence. In order to overcome the problems of proof which such an innovation would impose on the prosecution, it was recommended that the burden should be on the accused to disprove negligence. If he can establish that, despite the occurrence of the proscribed event, he acted with due diligence, he should not be convicted.³⁴

The due diligence defence has, as a reform measure, the added attraction that it is not wholly innovatory. There

are many statutes in Canada which already incorporate such a defence.³⁵ A basically similar measure has been proposed in the United Kingdom,³⁶ where there has also been strong judicial comment urging reform.³⁷ With regard specifically to the topic in hand, the United Kingdom misleading advertising legislation already contains such a defence.³⁸ In Australia, the need for reform has been pre-empted by the development, in the High Court, of the doctrine of honest and reasonable mistake of fact which can be regarded as a judicial variant of, or alternative to, the statutory due diligence defence. The doctrine was first enunciated by Dixon J. in the case of Maher v. Musson:³⁹

The terms in which the legislation is expressed do not make knowledge of the character of the spirits an essential element of the offence. To imply such a requirement would no doubt be possible, but in the case of a revenue statute of the tenor now in question, no presumption appears to rise in favour of that implication. Nevertheless, in the case alike of an offence at common law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances which, if true, would make innocent the act for which he is charged.⁴⁰

The doctrine was again discussed in Proudman v. Dayman,⁴¹ which is now regarded as the leading authority on the point.⁴²

There seems, therefore, to be wide concurrence in the view that legislation creating regulatory offences should offer to the accused the opportunity to exculpate himself by establishing that he took all reasonable precautions (or that he was labouring under a reasonable mistake of fact).⁴³ The Law Reform Commission of Canada's endorsement of the proposition increases the prospect of the law in Canada proceeding in this direction.⁴⁴

The question then arises as to what effect this development would have on the control of misleading advertising in Canada. It has already been seen that the most common objection to the abandonment of strict liability is that proof of intent would impose intolerable burdens on the pro-

secution and would undercut the effectiveness of the legislative scheme. The Law Reform Commission met this objection by indicating that where a due diligence defence is available, the onus would be on the accused to disprove negligence.⁴⁵ Does this observation dispose of the matter?

It does not, at first sight, seem to dispose of the alternative justification of strict liability in the context of offences such as those created by misleading advertising legislation--that the aim of such legislation is to protect consumers from deception, that they suffer irrespective of the state of mind of the advertiser in making the misstatement and that a departure from strict liability would make legal control sporadic.

A closer examination reveals, however, that this justification is ill-founded. It is true that consumers may suffer regardless of fault on the part of the advertiser, but it does not follow that their suffering will be alleviated by the prosecution of advertisers who have not been negligent. Consumers require protection in four respects from misleading advertising. First, they need assurance that an advertiser who has offended will not offend again. Secondly, they need assurances that advertisers in a position similar to the offender will not adopt similar tactics. Thirdly, they also require, in some cases, the removal of misimpressions generated by a misleading advertisement prior to its prohibition and which may continue to affect purchasing decisions even after prosecution. Fourthly, consumers already prejudiced by a violation need assurances of compensation.

With regard to the first two of these needs, it has already been urged that the criminal law can achieve very little by punishing persons who are not at fault. Accordingly, a departure from the doctrine of strict liability would not necessarily entail a weakening of the protection afforded to consumers by the legislation. It has in fact been argued that the retention of strict liability could have a soporific effect on both the law enforcer and the defendant. With the law as it now stands, the law enforcer can, theoretically, get a conviction without having to enquire whether the offending advertiser's business practices fell below acceptable standards of care and honesty. The advertiser, for his part, can plead guilty, save face on the ground that he was not really at fault (the element of fault being irrelevant to the

charge) and yet avoid having the spotlight of a court investigation focussed on his practices. In these circumstances, there must be doubts, despite high conviction rates, as to how far care is really being promoted.⁴⁶

As for the consumer's need for protection from the lingering effects of a misleading advertisement, the problem is not solved by the strict, unquestioning imposition of criminal liability. The need is for a wider, more imaginative range of sanctions against offending advertising. The point is crucial, but it goes not so much to the need for strict liability as to the wider question of whether misleading advertising should be governed by the criminal law at all. For if the goal is, at bottom, to eradicate harmful practices rather than to wreak vengeance on the actor, an administrative system geared to deal directly with the harmful situation is preferable.⁴⁷ The compensation objective is, of course, not served at all by either a strict liability or negligence approach to criminal sanctions as they presently stand and require either new sanctions or improved rights of civil redress.

The due diligence defence is, then, not theoretically at odds with the political considerations underlying misleading advertising legislation. But the introduction of such a defence may have undesirable repercussions in practice. Apart from the possibility, already noted, that it would not, in the misleading advertising context, necessarily result in a realignment of the law as written with the law as applied, there is the objection which has been raised by the Misleading Advertising Division to the proposal. It is said that the introduction of a due diligence defence into misleading advertising legislation would place great difficulties in the way of imposing liability on corporate defendants.⁴⁸ There do seem to be good grounds for this fear. To illustrate the point, an examination is necessary of the present law relating to corporate criminal liability.

The Nature Of The Defendant

Introduction. As might be expected, by far the greater part of prosecutions under such provisions as Sections 36 and 37 of the Combines Investigation Act are brought against companies.⁴⁹ The high incidence of corporate defendants in these cases raises two issues which bear directly on the suitability of the criminal law in the regula-

tion of misleading advertising practices. It will, in the first place, be immediately evident that difficulties--theoretical and practical--arise when attempts are made to impose criminal sanctions on fictional entities. Secondly, the law relating to corporate criminal liability is, at present, in a state of considerable confusion. So long as provisions such as Sections 36 and 37 are construed as imposing strict liability, much of the confusion is by-passed. But the introduction of a general defence of due diligence would bring all of these difficulties into play.

It is proposed to defer discussion of the difficulties associated with punishing corporate offenders to the final section of this chapter, where the shortcomings of the traditional criminal sanctions will be examined in some detail. The concern at present is with the problem of affixing liability. The topic is not an easy one and a rather detailed examination is therefore inevitable. To guard against the thread of the discussion becoming lost in the maze of issues, it may be advisable to state the conclusion at the outset. The conclusion is that, should corporate criminal liability become a central issue in prosecutions under Sections 36 and 37 as a result of the introduction of a due diligence defence, the restrictions imposed by recent decisions on the incidence of liability would probably impede successful prosecution in a significant number of cases. If this is correct, and if, as the Commission argues, justice required that a due diligence defence be available in respect of regulatory offences, the question yet again arises as to whether the heavy dependence of misleading advertising legislation on the criminal sanction should be lightened in favour of some other approach. Any conflict between the interests of justice and the effectiveness of consumer protection measures is, after all, not adequately resolved by trading one off against the other.

The Bases of Corporate Criminal Liability. The corporation lacks physical characteristics, it has no mind or will of its own and no existence, despite the legal fiction, independent of its shareholders and directors. How then can it be made criminally liable?⁵⁰

At this point in the evolution of corporate criminal responsibility, liability can take one of two forms which attach in different ways. First, a company can, in its capacity as employer, incur vicarious liability for the

acts of its servants.⁵¹ Vicarious liability attaches to corporations in the same way and in the same circumstances as it does in the case of individuals. Secondly, a company can, in certain circumstances, be fixed with primary liability.⁵² Whereas the notion of vicarious liability connotes responsibility in a person for the act or state of mind of another, the imposition of primary liability on a corporation means that it is made personally accountable as if for its own act.⁵³

(i) *Vicarious corporate criminal liability.* There is an underlying principle of justice that a man should not be penalized for the wrong of another. The general rule is that there is no vicarious liability in the criminal law.⁵⁴ However, just as statutes can create strict liability, so they can impose vicarious liability--or can at least be interpreted by the courts as so doing, for vicarious liability, again like strict liability, is rarely imposed expressly.

According to the traditional English view, the circumstances in which vicarious liability may be imposed are restricted. In the first place, where an individual delegates to another the performance of duties cast on him by statute, the individual may be held liable for the acts and state of mind of that other. The precise scope of the delegation principle is undetermined, but insofar as it is determinable at all, it seems now to be restricted to an anomolous class of cases generally referred to as the 'licensing cases'.⁵⁵ Secondly, an employer may be liable for acts done physically by his employee because those acts are held to be the employer's acts. Liability is affixed by means of a complex process of judicial interpretation in cases where the pivotal term in a statutory offence is ambiguous; words such as "sells" and "uses" have been interpreted as imposing liability on both the employer and the servant-actor. The actus reus of the servant is the physical act of selling or using; the actus reus of the employer arises from his status as "seller" in the contract of sale resulting from the physical act or as "user" in the wider sense of, for example, "using" a car in the course of his business.⁵⁶

However, in the case of strict liability offences, there has been a departure from these restrictive precepts. It is generally acknowledged that courts have little difficulty in affixing liability to corporations in cases where

the offence is one of strict liability,⁵⁷ although it is rarely explained why, in view of the narrowness of the general principles relating to vicarious liability, this should be so.⁵⁸ A grasp of the expanded operation of vicarious liability in the realm of the strict liability offence is essential to a proper appreciation of the impact which the introduction of a due diligence defence could have on the enforcement of misleading advertising legislation.

The departure from the general run of cases seems to owe its origin to the decision of the English King's Bench Division in Mousell Brothers Ltd. v. London and North Western Railway Company.⁵⁹ In that case, Atkin J., faced with the question as to whether a corporate defendant could be saddled with liability for the acts of its servant, formulated a general test for the imposition of vicarious liability:

while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute, in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed and the person upon whom the penalty is imposed.⁶⁰

The case created a generally phrased test which cut across the piecemeal development of rules of interpretation which had, up to that point, governed the question. It gave the courts a wide discretion in their self-appointed task of extending the scope of statutory offences. In applying the test, the most salient consideration appears to have been whether the duty imposed by the statute would normally be performed by a servant.⁶¹ An affirmative answer justified the inference that responsibility was intended to be fixed on the principal for the forbidden acts of his servant done within the scope of his employment.⁶²

The position now appears to have been reached in

England that, in the case of strict liability offences, an employer will be affixed with vicarious liability for the acts of his servants done within the scope of their employment even where those acts are performed without his knowledge or consent.⁶³ The rationale behind this apparently extreme position is that since these offences do not call for *mens rea*, it is immaterial that the defendant did not know what his servant was doing.⁶⁴

The scope of employment test has been applied in Canada to strict liability offences. It was, for example, applied in the recent case of *R. v. J. Clarke and Son Ltd.*,⁶⁵ where it was held that what is now Section 37 of the Combines Investigation Act imposes vicarious liability and that, therefore, a company will be liable thereunder in respect of acts done by a servant or agent within the course of his employment.

This seems to be the present state of the law in Canada. The ease with which companies are made responsible for their servants' acts greatly facilitates the task of the enforcement agency. The fictitious nature of corporate personality presents few problems in the context of the strict liability offence.⁶⁶ But this facility is afforded only by the strict liability factor. It disappears once due diligence defences are introduced because, as a rule, the presence of such a defence negates the inference that vicarious liability was intended.⁶⁷ Successful prosecution, therefore, comes to depend on the principles of primary corporate criminal liability which, as will shortly be seen, are by no means all-embracing.

(ii) *Primary corporate criminal liability.* The theory of primary corporate criminal liability owes its origins to the judgment of Viscount Haldane in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*⁶⁸ the crucial passage of which is as follows:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of personality of the corpora-

tion...The fault or privity of the company within the meaning of the statute is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.⁶⁹

This faction was incorporated into the criminal law in the case of R. v. I.C.R. Haulage Ltd.,⁷⁰ where it was held that a company could be included in an indictment for conspiracy, the fraud of the offending director being imputed, by means of the fiction, to the company.

Canadian courts in fact anticipated the English developments.⁷¹ In R. v. Fane Robinson Ltd.,⁷² the Alberta Court of Appeal, relying on Viscount Haldane's theory, found the accused company guilty of conspiracy to defraud and of obtaining money by false pretences on the basis of the acts and mental states of its directors. The principle has since repeatedly been reaffirmed.⁷³

The theory underlying primary corporate criminal liability is, therefore, well settled. The principal difficulty lies in determining the circumstances in which the acts or mental state of an individual will be imputed to the company, for it is only on the basis of the acts and intentions of superior officers that a company can be found personally responsible. In R. v. I.C.R. Haulage Ltd., it was said, rather unhelpfully, that the question depends "on the nature of the charge, the relative position of the officer or agent and the other relevant facts of the case".⁷⁴ Similarly vague criteria were advanced in the Canadian decision, R. v. Canadian Allis-Chalmers Ltd.⁷⁵ Perhaps the most evocative exposition is Denning L. J.'s metaphor, advanced in Bolton (Engineering) Company Ltd. v. Graham and Sons:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors

and managers who represent the brain and nerve centre, the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such....⁷⁶

As a rule, it will be the acts and mental states of the board of directors, individually or collectively, or of high executive officers which will be imputed to the company provided, of course, that the act is done by the particular officer within the scope of his employment.⁷⁷ It also seems to be clear now that should the board of directors delegate some part of its functions of management, giving the delegate full discretion to act independently, the delegate will be treated as having been put in their place and, within the scope of the delegation, he can act as the company.⁷⁸ The problem is, of course, to distinguish between a delegate with powers so extensive that he can be regarded as the 'directing mind and will of the corporation' and a servant who has been given a measure of discretion in the performance of his duties.⁷⁹ "It may not," as Lord Reid has remarked rather fatuously, "always be easy to draw the line but there are cases in which the line must be drawn."⁸⁰

The threat which these principles hold out for the effective enforcement of misleading advertising legislation is exposed by the decision of the House of Lords in Tesco Supermarkets Ltd., v. Nattrass.⁸¹ In that case, the appellant corporation had been charged under Section 11(2) of the Trade Descriptions Act 1968 (the equivalent, in the United Kingdom, of Section 36 of the Combines Investigation Act) with advertising goods at a price less than that at which they were in fact available. The appellant owned a chain consisting of several hundred branch stores and at one of these stores posters had been displayed advertising the sale of a brand of soap powder at a discount. The posters remained on display after the discounted line had been sold and a customer, upon being charged the normal price for the item, complained to the local Weights and Measures Inspector. Prosecution resulted. What had happened was that a shop assistant had replaced the discounted items, when they were sold, with packets displaying the normal price. She should have notified the manager of the supermarket, but did not do so. The manager was responsible for ensuring that the proper packets were on sale, but he had not done so.

The situation is a familiar one. A large number of pricing misrepresentations have probably occurred in similar circumstances and at this level of the corporate structure. There is little doubt that under the present Canadian legislation, a conviction would have resulted and would have survived appeal.⁸² However, unlike the Canadian legislation, the English Act contains a defence of due diligence. Section 24 provides in relevant part as follows:

- (1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for a person charged to prove -
 - (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person,
 - (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or by any person under his control.

The appellant argued that the commission of the offence was due to the default of "another person" (namely the manager) within the meaning of Section 24 and that, for its part, it had taken all reasonable precautions and exercised due diligence to avoid the commission of the offence. The company was convicted at trial, and that result was upheld by the Divisional Court on appeal.⁸³ It was overturned by the House of Lords.

The basis of the House of Lords' decision was that, according to the principles of identification, the manager could not be regarded as the directing mind and will of the company. He was not a superior officer in the corporate hierarchy nor had the board of directors delegated to him any part of its functions.⁸⁴ He was an employee in a relatively subordinate post,⁸⁵ a cog in the machine.⁸⁶ It was held that where an employer is under a duty to devise and implement a scheme of supervision and he instructs a superior servant to supervise the activities of inferior servants, he is not delegating his duty of supervision, but performing it.⁸⁷ Accordingly, the manager could not be identified with the company and was "another person" within the meaning of Section 24. The company, having both set up an efficient system for the

avoidance of offences and secured the proper operation of the system, had satisfied the requirements of Section 24(1) (b) and the defence was, therefore, made out.⁸⁸

The result of the decision appears to be that, where a defence of due diligence is available in respect of a statutory offence, there will be a substantial number of cases in which successful prosecution will be impossible. The decision is open to criticism on the ground that it places too much emphasis on the need to attribute an identifiable failing to a senior officer within the company before conviction will result. In many cases, the transgression may be due not to one particular offender, but to "general slackness within the corporate team".⁸⁹

One of the more salient points in favour of corporate criminal liability is that it allows for the application of a sanction in situations where it is not possible--or would be inappropriate--to fix responsibility on individuals within the corporate structure. Tesco was surely one of those instances for, although it would have been possible in that case to hold the manager personally responsible, such a course would have been inappropriate. He was merely part of a larger system instituted by the defendant: his oversight occurred within the system and arguably (despite the House of Lords' finding) as a result of inadequacies in the system. The goal of preventing misleading price statements is hardly served by the prosecution of lower echelon employees while the employer itself escapes liability and its system of supervision any form of scrutiny. And the Tesco situation is a frequently recurring one. The preoccupation in that case with the search for fault on the part of company officers militates against the rationale for corporate criminal liability. Furthermore, it has been said that the decision is likely to have the effect of confining corporate liability to situations where it is least needed. . In the case of large corporations, the commission of offences is more likely to occur at the middle or lower levels--not at the level of management. The identification principle will, in these situations, preclude the imposition of primary liability on the corporation. In the case of small corporations, however, it is much easier to impose liability on managerial officers and the incidence of corporate liability will accordingly be higher. But where it is possible to identify and impose liability on the individuals involved in the commission of an offence, the rationale

for corporate liability is absent.⁹⁰

It follows from these observations that it will frequently be impossible to impose primary corporate criminal liability where it is most needed and that, where it is most easily imposed, it will be redundant. Shortcomings of this nature are not conducive to the effective enforcement of consumer legislation.

The question remains, however, as to whether these problems would arise in Canada should a defence of due diligence be introduced in respect of the offences created by Sections 36 and 37.

It has already been seen that the Canadian position with respect to primary corporate liability is similar to that obtaining in England. However, in situations such as that which arose in Tesco, where it becomes necessary to decide whether the discretion conferred on a particular employee in the performance of his duties justifies the inference that he is 'the directing mind and will' of the company, the Canadian courts have, on occasion, demonstrated a greater eagerness to fix liability on the company than have their English counter-parts.

In H. M. The Queen v. H. J. O'Connell Ltd.,⁹¹ the court had no hesitation in fixing liability on the company for forgery, uttering forged documents, fraud and conspiracy in respect of acts done by an employee who was not a superior officer. The actor in that case was a foreman employed by the company who enjoyed a good deal of independence in the performance of his duties and who had authority to enter into minor contracts which were incidental to the company's major operations. It was held, perhaps rather surprisingly,⁹² that the extent of control delegated to him was sufficient to justify the equation of his acts with those of the company. A similar result was reached in R. v. J. J. Beamish Construction Ltd.,⁹³ an action brought under Section 32(1) of the Combines Investigation Act, where the employee who had involved the company in the illegal combination gloried under the title of "superintendent" and had virtually sole responsibility in one division of the company. In R. v. St. Lawrence Corporation Ltd.,⁹⁴ another case involving a prosecution under Section 32(1) of the Combines Investigation Act, Schroeder J. A. of the Ontario Court of Appeal opted for astronomy over anthropomorphics⁹⁵ in fixing a company with liability for the

acts of a minor executive:

He may have been but a satellite to a major planet, but his position in the galaxy was not an inferior one and the learned judge was entitled to attach criminal liability to the company by reason of his acts....⁹⁶

In the most recent case on the point, R. v. Waterloo Mercury Sales Ltd.,⁹⁷ a used car sales company was convicted of fraud under Section 338(1) of the Criminal Code, its sales manager having tampered with the odometers of several cars in the yard. Again, the sales manager was not an executive officer of the company, although he did have the responsibility of purchasing cars for resale on the company's behalf and was authorized to incur debts against the company. It was held that he was not a lesser employee and was the directing mind and will of the company.

Insofar as these cases might be regarded as establishing a trend, they indicate a tendency to approximate the circumstances in which primary liability will be imposed on a company with those in which vicarious liability will be fixed, for the lower the servant who is vested with the status of directing mind and will, the easier it becomes to adopt the alternative view that the company is liable because the servant has committed an offence within the scope of his employment. It seems generally to be regarded that, from the point of view of criminal justice, an equation of the two bases of liability would be invidious.⁹⁸ However, for those charged with the enforcement of consumer legislation containing due diligence defences, it would be an undisguised blessing for, in a Tesco situation, liability would still attach to a corporation, despite the defence, on the basis that the servant-actor was the directing mind and will of the company. In other words, the defence would be emasculated. If this is the case, a further point of conflict emerges between the requirements of criminal justice and public interest in the effective enforcement of consumer legislation.

On the other hand, the trend in the Canadian case law may not be of that order at all. It may simply be that the Canadian courts are attempting to shake themselves loose from the unreasoned reliance on the metaphysical relationship of mind to body which seems to govern the primary liability in English law of a corporation for the acts of its officers.

It is possible to regard the judgments as hailing an approach where corporate liability is to be determined not by reference to a preconceived abstraction, but by an analysis of the particular corporate structure and of the nature and extent of the officer's duties in each case.⁹⁹ If this is so, then corporate liability will depend on a large number of variables whose precise significance will remain indeterminate up to the point where they are applied. But the end result may not be much different from that which is foreshadowed by the decision in Tesco. There will be a significant number of cases, should a due diligence defence be introduced, where companies will escape liability because, on the facts of the case, the servant-actor was not vested with primary corporate powers. So the question arises yet again--where would that leave the effective enforcement of misleading advertising legislation? It is interesting to note that a similar question was raised in England in a commentary on the Tesco case:

The larger principle underlined by the decision in this case has no simple solution. If decision after decision of the courts suggest the unsuitability of the criminal sanction for the enforcement of public welfare legislation against organizations, what other means can be found for the enforcement of this still-essential (sic) legislation?¹⁰⁰

Proposals for a Qualified Due Care Defence. A reference should be made at this point to section 45 of the Combines Investigation Act,¹⁰¹ which would be of some assistance in the prosecution of cases under Sections 36 and 37 should a due diligence defence be introduced. Section 45 creates a rebuttable presumption to the effect that anything which is (inter alia) done by an officer, servant or agent of a company is deemed to have been done with the authority of the company; similarly, any document written or received by an officer, agent or servant of the company is prima facie deemed to have been written or received with the authority of the company.

The provision was inserted to overcome the sort of problem which arose in R. v. Ash Temple Co. Ltd.¹⁰² In that case, a number of companies were charged with conspiracy under the anti-combines legislation. The prosecution sought to introduce into evidence a large number of documents as proof of the conspiracy. The documents came from the files of one of the defendant companies. It was held that mere

proof of possession by a company of incriminating documents was not sufficient. It had further to be shown that, according to the principles of primary corporate liability, the board of directors or its delegate had knowledge of the existence and contents of the documents. The decision threatened to make prosecution of conspiracy cases exceedingly difficult for conspiracies are, by their nature, secretive and virtually impossible to establish by direct evidence.¹⁰³

Section 45 removes these evidentiary difficulties from the prosecution by shifting the onus, once the occurrence of an act or the existence of a statement or document is established, to the defendant company to prove that it was not involved through either its high managerial officials or a delegate.

It should be noted, however, that Section 45 provides only an evidentiary concession. It facilitates proof of managerial implication. It is not designed to assist in the substantive question of what constitutes managerial implication.¹⁰⁴ It would be something of a palliative, but certainly not a cure, for the ills with which the Tesco case and related decisions threaten to infect misleading advertising provisions.

Perhaps more promising possibilities for ameliorating the adverse administrative consequences of admitting a due care defence are suggested by recent Committee amendments to the amendments to the Combines Investigation Act presently before Parliament. For certain misleading advertising offences, section 37.3(2) recognizes a due care defence, the onus of proofing which lies on the defendant (as now the B.C. Trade Practices Act does in a 1975 amendment (s.25A)), but the availability of the defence in the Combines amendments is conditioned upon the defendant having taken reasonable measures to bring the error, forthwith after the representation was made, to the attention of the class of persons likely to have been reached by the representation i.e. a form of corrective advertising (a subject we discuss in detail in our next chapter). The twin requirements of prior due care and subsequent willingness to correct the error find a long-standing parallel in the law of defamation where unintentional defamations will not result in liability where they occurred despite the exercise of reasonable care and are followed by a reasonable offer of amends.¹⁰⁵

The virtue of this approach is that it supplies a powerful incentive to potential violators to adopt self-corrective initiatives which obviate the need for formal sanctions and economize on the demands made on public enforcement resources. Moreover, the problem high-lighted in Tesco would also be partly obviated because even if due care could be made out by the company on those facts, the obligation to publish a correction would still need to be met for a defence to be sustained.

However, in order to increase the self-correcting incentives in the market-place, we would go one step further than s.37.3(2) of the amendments. Publication of a correction will only avoid further consumers being misled; it does nothing for those already prejudiced by the misrepresentation. We believe that in addition to the requirements of prior due care and a subsequent correction, in order to sustain a defence it should also be necessary for a defendant to show that he has taken reasonable measures to offer amends to that class of consumer who may already have been prejudiced. These measures might entail monetary adjustments, substitution of products, credit against other purchases etc. We assume that it would normally be feasible to publicize such an offer in the notice of correction already required now by the amendments. Again, a defendant in the position of the defendant in Tesco, while able to prove due care, would still have to make amends to consumers already damaged by the misrepresentation (as well as publish a correction for the benefit of prospective customers).

A three-standard defence of this kind would produce powerful incentives to potential violators, once an error had been brought to their notice, to adopt remedial initiatives, in order to avoid subsequent prosecution. All interests are served by this -- the merchant, who is thus able to avoid prosecution, the consumer, who receives notice of correction or appropriate amends, and public enforcement authorities, who can avoid wasting resources on a prosecution when all the objectives of a conviction have already been served.

It is convenient at this point to deal with another defence commonly provided in misleading advertising offences-- that of good faith in the case of a publisher of an offending advertisement (see e.g. s.36(2), 37(3) of the Combines Investigation Act). The report of Mr. J. (Ian) McLeod and Ms. Sonja Dihm for the B.C. Minister of Consumer Services on

Standards for Acceptance of Advertising Copy by the Media (1975) makes a persuasive case that subjective good faith (or, as American commentators have called it, "the rule of the pure heart and empty head") does not demand enough of media in accepting and publishing advertisements. After all, with news copy it is not disputed that there is both a social and legal duty to take reasonable care to ensure that the news is accurate. Similarly in the case of advertising material, surely there ought to be some duty on the publisher to be alert to circumstances which might suggest to him that a particular advertisement contains misstatements. The 1975 amendments to the B.C. Trade Practices Act (s.1A) permits a publisher to avoid liability under the Act only if he can prove that the advertisement was accepted in the ordinary course of business and that he did not know and had no reason to suspect its publication would involve a violation of the Act.

We endorse this provision. Advertising copy should not, in principle, entail different media responsibilities as to accuracy than news copy. By imposing some standard of care on the media in this respect (albeit a relatively relaxed one), again another check and balance is introduced into the system of advertising controls, and dependence on formal public enforcement initiatives is further reduced.

The Nature Of The Sanction

Introduction. In concluding the case against use of the criminal law as a major weapon in the control of misleading advertising, it is necessary to devote some attention to the traditional criminal sanctions.

The fine is by far the most common sanction provided for violation of regulatory offences. It will be seen that, at least in its usual form, it is an inadequate, often clumsy, device for punishing economic offences such as those created by misleading advertising legislation. But it can be modified. And there are alternative measures the implementation of which could greatly strengthen the impact of existing laws.

The Fine. The fine is the sanction most frequently resorted to for violations under Sections 36 and 37 of the Combines Investigation Act. But despite the frequency of its application, it is of dubious value.

There should, ideally, be a double sting in the imposition of criminal penalties. The punitive element should lie not only in the actual sentence imposed by the court, but also in the stigma of conviction. The fear of public disgrace should be (at least) as effective a deterrent as the economic embarrassment of a financial penalty. Many economic offences, however, labour under the problem of what has been called "moral neutrality".¹⁰⁶ Quite frequently, the sort of conduct proscribed is widely regarded as acceptably aggressive business behaviour and is not readily distinguishable from conduct which is considered positively desirable in a free enterprise ideology.¹⁰⁷ It does not tally with the popular conception of crime and does not, therefore, attract the adverse public reaction which is directed against more immediately recognizable forms of criminal activity. The absence of stigma affects the utility of the criminal penalty in controlling such conduct.

Even assuming that moral stigma does attach to these offences, doubts have been raised as to whether it can operate where the defendant is a corporation. It is, at first glance, not easy to discern what impact public disapproval can have on a fictional entity.¹⁰⁸ On the one hand, the abstraction itself can have no sense of shame and, on the other, the individuals--the real guilty actors--can avoid the sting of public reaction by sheltering behind the corporate veil.

Yet the applicability of these observations to misleading advertising offences in Canada is open to question. The point directed at the problems in attaching stigma to corporate offenders is largely speculative. As such it can be countered by speculation. Notions to the contrary have been that those who occupy managerial positions within a corporate organization generally have a spirit of loyalty to the enterprise and that is a sentiment upon which stigma can have some impact.¹⁰⁹ It has, alternatively, been suggested that stigma can have a deterrent impact on a company's activities by impairing its business reputation and thereby adversely affecting its economic position.¹¹⁰ If this is the case, however, the impact would probably vary according to such factors as the size of the convicted company, the extent of competition in the market within which it operates, the dominance of its position within the market and the degree to which the conviction attracts public notice.¹¹¹

As for the problem of moral neutrality, it is, in the case of misleading advertising offences, not borne out by observation. In Canada it is clear that, at least so far as the larger enterprises are concerned, there is a real fear of conviction and of the associated adverse publicity.¹¹²

There are, in the absence of a conclusive explanation as to why this should be so, a number of plausible reasons which come to mind. First, it may well be the case that misleading advertising is no longer (if it ever was) morally neutral conduct. Certainly, outright fraud and overt deception never enjoyed that status. As for the rest, it may well be that the free enterprise ideology, particularly since the rise of consumerism, can no longer be appealed to as a blanket justification for "aggressive business behaviour". As the shift occurs, measures adopted in the pursuit of profit become morally unacceptable if they run counter to the public interest in an informed and properly functioning market. In this scenario, business conduct is not sacrosanct simply because it is business conduct.¹¹³ To some extent, also, the more intensive prosecution of economic offences probably has a generative influence on its own effectiveness, for the more frequently it is impressed upon the public that such conduct is illegal, the greater the prospect of a public reaction against that conduct.¹¹⁴ Secondly, it is not the nature of the conduct alone which excites public reaction. The mere fact of contravention of a criminal prohibition may in some cases be seen to provide an independent basis for condemnation.¹¹⁵ This factor is likely to have particular weight in the case of large business enterprises which trade on their image of respectability and stolidity.

Yet, in the final analysis all that can at present be said about the stigmatic effect of conviction for misleading advertising offences is that it will be more evident in some circumstances than in others, more feared by some businessmen than by others. It is certainly highly variable and it is likely that in some cases it would not operate at all.¹¹⁶ Where stigma does attach, the fine can have a high deterrent value. But in cases where there is no stigma, or where it is weak, the effectiveness of the fine as a deterrent will depend on the economic threat which it poses for prospective offenders.

In general, the economic threat is not very fearsome. The principal difficulty lies in setting optimal limits

on the penalty and in ensuring that the optimal amount within those limits is imposed by the courts in each case. The offences created by Sections 36(1) and 37(2) of the Combines Investigation Act are punishable on summary conviction and as such, impose on corporations a maximum fine of \$1,000.¹¹⁷ Section 37(1) creates an indictable offence for which no maximum exists; the size of the fine is, in each case, at the discretion of the court.¹¹⁸

The \$1,000 maximum penalty for contraventions of Section 36(1) is extremely low. In practice, the fines imposed by the courts are even lower, for the maximum fine is rarely imposed.¹¹⁹ Nor has the absence of a maximum limit in the case of Section 37(1) resulted, overall, in the imposition of significantly higher penalties.¹²⁰

In most cases, therefore, the charge can be laid that the fines bear no relation to the profits made by the accused from the illegal enterprise. Sometimes they are so low as to amount to little more than a licence fee to continue in the prohibited conduct.¹²¹ In these circumstances, the imposition of a fine can, from an economic point of view, have no deterrent effect at all.

This shortcoming goes deeper than may at first sight appear. It will not be remedied simply by raising the maximum limits or by requiring the courts to impose much higher penalties. The size of the fine is not the only factor relevant to the deterrent impact of an offence. The probability of conviction is also crucial. The relationship between these variables and the deterrent potential (on the economic level) of a penalty can be described mathematically. The prospective offender will be deterred, if at all, by the expected punishment the size of which can, as a first approximation, be calculated by multiplying the amount of the penalty likely to be imposed by the probability of conviction.¹²² If, for example, the maximum fine for an offence is \$1,000, and 1 in 10 offenders are caught and convicted, then the conclusive figure--the anticipated gains from violation are greater than the anticipated cost, violation is profitable and, in the absence of stigma, probable.¹²³ To balance anticipated gains against anticipated cost, it would be necessary to impose a penalty equivalent to the sum derived by dividing the expected gain by the probability of conviction. In terms of the above example, that would be a fine amounting

to ten times the potential profits in the venture.

The calculation is, of course, over-simplified in that it assumes that the point of deterrence must coincide with the point at which anticipated costs and benefits are balanced. Insofar as economic considerations are decisive, many offenders will be deterred once anticipated costs become too high in their assessment of risk and that may happen even where they still fall well below the level of anticipated benefits.¹²⁴ But even if the formula were modified to accommodate this point, it would still be questionable. Justice requires that the penalty should be in some way proportional to the crime committed. The most effective way of preserving this relation is to impose penalties approximately equal to the damage caused by the offence.¹²⁵ Yet, the above formula would result, for the one in ten offenders unfortunate enough to be convicted, in a punishment grossly in excess of the harm caused. Such an offender would, in a sense, be saddled with an enormous fine not so much because his conduct merited it, but because it was required to buttress flaws in the enforcement system as a whole. And even if provision were made for the imposition of very large penalties, it is to be doubted whether the courts would impose them.¹²⁶

The only other way in which a balance might be achieved between anticipated costs and anticipated benefits is by raising the conviction rate. But to achieve this result while still keeping the penalty proportionate to the crime in each case would entail so high a degree of surveillance that the costs involved may exceed the benefits being sought.¹²⁷

There seems, then, to be no way around the difficulty. The best that can be hoped for is that it will be minimized. The most important step in this direction is that the penalty imposed be tailored to fit the violation. In the case of misleading advertising offences, this would require, at the least, that a convicted offender not be permitted to retain the profits which he has earned as a result of his offence: the fine should, in each case, be at least as great as the total profits actually earned by virtue of the violation.¹²⁸ Of course, where the social harm flowing from the violation is great, it may be necessary to impose a fine higher than that which would deprive the defendant of his ill-gotten profits. In such cases, the fine might be

raised above the profit figure to a level which adequately reflects the seriousness of the offence. The point to be emphasized, however, is that a fine which falls below the basic point of reference--the illegal profit level--is unlikely to be fully effective as a deterrent.

Selectivity in prosecution is also important in maximizing the deterrent potential of the criminal law. Accepting the limitation that not all offenders can be prosecuted, the efforts of the enforcement agency should be directed less toward securing a large number of "easy" convictions than to the pursuit of the frequent violator and of the violations which cause the most harm.¹²⁹

It remains, of course, to consider how the amount of the fine is to be determined in each case. Sometimes the confiscation from the offender of his ill-gotten profits will be sufficient. In cases where there is a substantial variation between the amount of the profits illegally earned and the social harm caused by the offence, it may, in the interests of justice, be necessary to raise the fine above the profit level so as to reflect the seriousness of the offence.

In considering an appropriate formula for the calculation of the desired quantum in each case, the point should be borne in mind that the random imposition of large penalties, while perhaps seeming statistically impressive, can lead to discrepancies in practice. The imposition of a substantial penalty on a large enterprise may have virtually no effect at all. The same penalty might force a small trader out of business. The first tenet to be observed is, then, that the fine should in some way be related to the financial position--or the size--of the offender in each case.¹³⁰ A major difficulty is that it will often not always be easy to ascertain the amount of the profit earned by the offender in contravention of the legislation.

A proposed new federal Criminal Code in the United States contains the traditional fining provision setting statutory maxima for various offences. It also embodies an alternative:

In lieu of a fine imposed under subsection (b) or any other provision of law, a person who has been found guilty of an offense through which he directly or indirectly derived pecuniary gain, or by

which he caused personal injury or property damage or other loss, may be sentenced to a fine which does not exceed twice the gross gain derived, or twice the gross loss caused, whichever is the greater.¹³¹

The provision has the attraction that, in referring to the notion of gross gain, it avoids at least some of the accounting difficulties which might arise if the net profit earned by the offender were the governing criterion.¹³² Insofar as assessment of the penalty size is to be based on double the profits made, the approach might be regarded as both arbitrary and inflexible. But the Code also provides, in Section 2202, for account to be taken, in sentencing, of the defendant's ability to pay the fine. Depending on how carefully this discretion was exercised by the courts, it would meet the first requirement--that the penalties for similar offences should, as regards different offenders, remain relatively constant in impact rather than in size.

An alternative suggestion has been advanced that the penalty for economic offences should consist of a mandatory 25 per cent of the total profits earned by the offender for each year in which the violation continued.¹³³ The 25 per cent figure is arbitrary, but it is suggested that it represents a satisfactory compromise between the need to deter and the need to avoid inflicting financial disaster on any defendant. It is further suggested that assistance might be gained, in assessing profits, from defendants' tax returns.¹³⁴ The proposal has the distinct advantage that it would avoid the formidable difficulties which might sometimes arise in separating the defendant's ill-gotten profits from those which he earned legitimately during the continuance of the contravention. But it is, arguably, misdirected, for a fine imposed according to such a formula would not necessarily bear any relation to the offence committed. At one extreme, a defendant might retain a sizeable proportion of his ill-gotten earnings, even after 25 per cent of his overall profits had been confiscated. At the other extreme, where the offence--in terms of gain derived or harm inflicted--is slight, a fine calculated on this basis will be unnecessarily high. These problems might be met if the size of the percentage was not mandatorily imposed by the legislation, but was left to be calculated by the court to meet the requirements of individual cases.

Finally, it has sometimes been suggested that penalties should be calculated not by reference to profits, but as a percentage of the defendant's annual turnover for a certain period prior to the conviction.¹³⁵ The suggestion is attractive in that it would prevent a defendant frustrating the process of quantification by burying his profits but, again, it suffers from the drawback that a fine so calculated would not necessarily deprive the defendant of ill-gotten gains. On balance, therefore, profit seems to be the most variable referent.

There is, however, another problem which reflects on the adequacy of all these measures. It has frequently been urged that, in the context of economic offences, fines--large or small--can have no deterrent impact at all, for the defendant can always forestall any losses by passing the penalty on to consumers in the form of higher prices.¹³⁶ This facility may not always be available. Prevailing market or political conditions may prevent price rises. A company operating under highly competitive conditions, for example, would lose sales if it attempted to raise the price of its products to absorb a fine. Even a monopoly trader may in some circumstances be unwilling to adopt such tactics. This might be so where, for instance, its immediate aim was to increase unit sales rather than to reap the highest possible profit. In other circumstances, corporations might be fearful of attracting government regulation of their industry or intervention in their affairs should they increase their prices too frequently.¹³⁷ But in cases where the opportunity does exist, the above proposal might further be modified by allowing for the imposition, at trial, of a provisional fine, the final amount to be determined by reference to a set percentage of the defendant's annual profits for, say, two years after conviction.¹³⁸ Such a measure would, of course, mean that the more the defendant raised its prices subsequent to conviction, the higher would be the fine which it would ultimately have to pay.

By way of recapitulation, then, it can be said that the fine in its present form will only be effective as a deterrent measure where moral stigma attaches to the prohibited conduct. Even where this is so, it could be improved. In other cases, where stigma is absent or is weak, the deterrent effect depends solely on the size of the fine and there are formidable difficulties in the way of calculating and imposing optimal amounts. These difficulties could be re-

duced, particularly if the size of the fine were at least to approximate the profits made by the defendant in contravention of the law. At the same time, it is necessary, in the interests both of fairness and efficiency, that the size of the defendant's business be taken into account in calculating the total amount of the penalty to be imposed. In some cases, these requirements might be met by the imposition of a fine based on an appropriate percentage of the defendant's profits in recent years. In other cases, particularly where there is a likelihood of the fine being passed on to consumers, a more efficient approach might be to base the fine on the defendant's profits subsequent to conviction. It is, of course, not suggested that the implementation of these measures would solve all of the problems associated with the process of fining. They do, however, offer interesting possibilities for the control of misleading advertising through the criminal law. The modification of the fine in this way could make it a much more powerful tool for economic regulation than it has been to date.

Yet the fine is not the only tool at the disposal of the criminal law. There are other measures which might be at least as effective in the criminal context, either instead of, or in combination with, the imposition of a monetary penalty.

Prohibition Orders. Section 30(1) of the Combines Investigation Act empowers the court, on application of the Attorney General of Canada or of the attorney general of a province, to prohibit the continuation or repetition of an offence and acts done in connection therewith. The prohibition may be imposed in addition to any other penalty imposed on the person convicted.

The device is an extremely useful one. Unlike the fine in its present form, it can be tailored to meet the circumstances of a particular offence. Moreover, orders are usually directed not only against the offending corporation, but also against the individuals who control it. Disobedience of an order can result in imprisonment.¹³⁹

Section 30(2) makes provision for an unusual variant of the prohibition order. It empowers the court, on application of either the Attorney General of Canada or a provincial attorney general, to prohibit the commission of an offence or the engaging in any act which constitutes or is

directed toward the commission of an offence. The unusual feature of the provision is that it allows for the imposition of a criminal sanction¹⁴⁰ in the absence of a conviction and, indeed, without a finding by the court that the acts against which the order is directed appear to constitute an offence. However the criminal onus of proof remains applicable to orders obtained under s.30. It was held by the Supreme Court of Alberta in R. v. Canadian Safeway Ltd.,¹⁴¹ that, in issuing an order under Section 30(2), the court need satisfy itself only that the party against whom the order is sought has done acts or things constituting or directed toward the commission of an offence.¹⁴² The court discerned a twofold objective underlying the provision: first, it provides, in appropriate cases, a more effective remedy or deterrent than a monetary penalty (on the same basis, presumable, as a Section 30(1) order) and secondly, it avoids the necessity of prosecution in every case.¹⁴³ In furtherance of the latter objective, the provision may confer some of the benefits of a preliminary injunction--whereas under the normal procedure a defendant is free to continue in practices which have been challenged up until the point where a conviction is recorded against him, resort to Section 30(2) can obviate the delays inherent in the criminal process and result in the immediate cessation of practices which are apparently illegal. The Section 30(2) remedy differs, of course, from the preliminary injunction in that the orders for which it makes provision are permanent. The procedure also increases the control exercised by regulators over trade practices--it allows for the prohibition not only of acts which appear to constitute an offence, but also of acts which might in the future constitute an offence and of acts which are ancillary to the commission of an offence.

Unfortunately, the possibilities offered by the prohibition order have not been fully exploited. Both Section 30(1) and 30(2) orders are imposed infrequently.¹⁴⁴ Even then, at least in the case of Section 30(1) orders, the prohibition is usually framed very narrowly and is directed solely against the repetition of the particular offence in issue. The rationale for this restraint was explained by Kelly J.A. of the Ontario Court of Appeal in R. v. F. W. Woolworth Co. Ltd.:

It appears to me that Parliament has shown a clear intention that, in the usual course, the imposition of one or more of the penalties provided by the Criminal Code for the punishment of a person

convicted of an offence punishable by summary conviction will be an adequate deterrent. In order to justify the Court in exercising the discretion to impose the special remedy under s.30(1) a Court should be satisfied that there exist circumstances from which it is reasonably inferable that the purpose of the Act will not be accomplished unless the special remedy of a prohibitory order is invoked in addition to the normal penalty of fine and imprisonment. The evidence before the Court ought to show a deliberate and flagrant disobedience of the section and a likelihood of a continuation or repetition in the absence of prohibition.¹⁴⁵

It is clear, then, that the courts do not regard the prohibition order as an alternative to the fine, but rather as a measure of last resort, to be imposed in situations where the fine alone is considered to be inadequate as a deterrent. There is, possibly, a case to be made for confining the prohibition order, in the criminal context, to a supplementary role,¹⁴⁶ but if it is restricted too much, it begins to lose its value as a general deterrent. The prohibition order could, surely, play a more imaginative role than that envisaged for it by Kelley, J. A. It might, for example, be imposed in addition to a fine where the adequacy of the fine alone is open to doubt in view of the defendant's ability to absorb it in the form of price rises. Or it might, in some circumstances, be an appropriate remedy against large corporations where the imposition of a fine, no matter how substantial, would amount to little more than a token gesture. In any event, there is nothing in the wording of Section 30 which requires the restriction of the device to cases of "deliberate and flagrant disobedience".

But the prohibition order, even if imposed more frequently and more imaginatively, still suffers from a shortcoming which it shares with the fine--it is prohibitory rather than prescriptive. It can, as such, perform only two of the three functions required of effective consumer legislation. It can be used to deter the defendant from offending again and to discourage others from offending at all. But it cannot undo the harm already caused by a misleading advertisement. Quite frequently, by the time a prohibition order is imposed against the continuation or repetition of a misleading advertisement, the campaign will be over and

will have had the desired effect.

Publicity as a Formal Sanction. This problem might be met by the imposition on defendant advertisers of formal publicity orders, either alone or in conjunction with any other penalties which might be considered appropriate.

Publicity was first conceived of as a criminal sanction by the National Commission on the Reform of Federal Criminal Laws in the United States. In its proposal for a new federal Criminal Code, the Commission recommended a special sanction for organizations:

Where an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.¹⁴⁷

For the normal run of regulatory offences, the device might be used to heighten the deterrent impact by artificially injecting with stigma illegal conduct against which there had been only a low public reaction. But in the case of consumer legislation, it has further possibilities. If a defendant advertiser were required to publicize not only the fact of his conviction but also details of his conduct which led to the conviction, including the reasons why his advertising claim was found to be misleading, and a statement aimed at correcting the misleading impression which had been given by the claim, the measure might work toward the undoing of the harm already caused by the contravention.

A similar device is already in operation, in an administrative context, in the United States, in the form of the corrective advertising orders issued by the Federal Trade Commission.¹⁴⁸ Publicity sanctions, again in an administrative context, are included in Alberta's Unfair Trade Practices Act and in British Columbia Trade Practices Act. Both pieces of legislation empower the court to order the publication of details of any judgment, declaration, order or injunction granted against a supplier who has contravened the Act.¹⁴⁹ Section 16(2) of the Alberta Act provides:

In making an order under subsection (1), the court

may prescribe:

- (a) the methods of making the advertisement so that it will ensure prompt and reasonable communication to consumers;
- (b) the content or form or both of the advertisement;
- (c) the number of times the advertisement is to be made;
- (d) such other conditions as the court considers proper.

There is no reason in principle why similar measures should not be adopted in a criminal context.¹⁵⁰

However, the implementation of publicity as a sanction would by no means be free from difficulties. The attraction in the measure as a means of countering misleading advertising lies in its singular appropriateness. Not only does it offer a practical solution to the problem of dispelling the misleading impression created by advertisements, but it also looks neat--there is very much an element of poetic justice in requiring advertisers to advertise their own transgressions. But it is this very point--the fact that it attempts to tackle advertisers on their own ground--which prompts questions as to how effective it can be.¹⁵¹

There may, for example, be problems of persuasion. In most cases, ex hypothesi, the counter-publicity would be competing with the persuasive effects already created by the offending campaign. To be effective, therefore, it may have to be equally persuasive. Yet this may prove difficult, for its principal goal must remain to communicate an important piece of information about the defendant and his advertising practices. On the one hand, the information must be presented in a form which is sufficiently appealing to attract attention and on the other, the form of presentation cannot be allowed to obscure the gist of the message.¹⁵² Even if a balance can be struck, in the individual case, between the two requirements, there remains the question of what effect persuasion and counter-persuasion, conditioning and counter-conditioning would have on the consumer. It has been sug-

gested in a slightly different context that, rather than enlightening him, "it may instead confuse him and, like Pavlov's dogs, simply make him neurotic".¹⁵³

On the other hand, these difficulties may, in the present context, be little more than straw men. It is quite possible that counter-publicity would not need to be persuasive--that the shock value in the factual announcement that a familiar advertiser or trader has run foul of the law may be sufficient to attract the attention of the public. And, after all, if the aim of publicity is to counter a misleading impression (rather than to deter), all that can reasonably be expected of it is that it put the relevant information before the public. It is unrealistic, and perhaps unnecessarily paternalistic, to require that it also push consumers into using that information in a certain way.

Yet this point itself gives rise to another, rather more tangible, objection to the use of publicity as a criminal sanction. As a form of punishment, it is uncertain in impact, for its effectiveness depends partly on public reaction and partly on the characteristics of the particular offender and the circumstances in which he operates. There would be no way of determining, at the moment of sentencing, what effect the publicity would have.¹⁵⁴ In this respect, it is as indeterminate as the impact of the stigma associated with conviction for more conventional crimes. It has been suggested that a firm enjoying a monopoly position in a market would be less subject to control by publicity in economic regulation than a firm in a competitive industry, for such an enterprise would have less to fear, in economic terms, from adverse public reaction.¹⁵⁵ On the other hand, publicity may be singularly effective in markets where competition is based not on price and quality factors, but on product differentiation. Since this sort of competition operates on the precarious basis of public image, it may be peculiarly susceptible to adverse public reaction.¹⁵⁶ If this is correct, then there may be scope for the remedy should attempts be made to impose controls on advertising which is aimed at fostering artificial product differentiation. Yet all these considerations are again speculative. The point is, simply, that too little is yet known about the operation of publicity to allow definite conclusions to be drawn as to its utility.¹⁵⁷

Although this lack of knowledge tends to dull the

attractiveness of publicity as an independent criminal sanction, it does not necessarily demand abandonment of the measure altogether. In many respects, the best way of gaining insight into the workings of an innovatory measure is to observe it in operation. There is a case to be made for experimentation with the publicity sanction in the criminal law field. This might be done by combining publicity, in particular cases, with other, more conventional sanctions. The imposition of a fine or prohibition order could, for example, be relied on to produce the necessary deterrent influences while the simultaneous imposition of a publicity order might be directed to the third goal--to the undoing of the harm already caused by the offence. It may become apparent, as the experiment develops, that publicity works better in some cases than in others and that it does, in some circumstances, have an independent deterrent effect of its own. However, continued resort, during the period of experimentation, to the traditional sanctions in combination with publicity should act as a control to prevent the temporary uncertain impact of the measure from thwarting the effective enforcement of the criminal law.

Advertising or Promotional Bans. A measure, closely related to the publicity sanction, which has sometimes been proposed is that persons convicted of misleading advertising offences be banned, for a certain period, from advertising the product or services in respect of which the misleading claim was made.¹⁵⁸

As with publicity, the proposal has the attraction that it operates directly against the prohibited conduct. Unlike publicity, however, it lacks the facility for undoing the harm caused by a misleading advertisement. A ban would not require the advertiser to communicate the truth to the public--it would simply prevent him from communicating with the public at all.

Moreover, since this is the case, the only end to be served by the imposition of a ban is the infliction of a monetary loss on the offender--by inducing a downturn in his sales or by requiring him to increase his advertising expenditure, upon removal of the ban, to make up lost ground.¹⁵⁹ But this end can in many cases be attained more directly--and with greater certainty--simply by imposing a fine.

Dissolution. As a measure of absolute last resort--for persistent and serious cases of fraud, for example, the court might be empowered to order the dissolution of an offending company.¹⁶⁰

The use of dissolution as a punitive measure has been trenchantly criticized. In the first place, its invocation against a large corporation would result in economic chaos. For that reason, it would, in practice, be directed almost exclusively against small enterprises. But those are the cases in which it is least needed, for it is easier, in a small company, to trace the individuals responsible for the commission of the offences.¹⁶¹ Secondly, the remedy may result in grave injustice to shareholders--at least in situations where they have no knowledge of, or no control over, the commission of the offence.¹⁶² Thirdly, the measure may be of low deterrent value, particularly if the company can be re-formed and resume trading.¹⁶³ In any event, the measure, at least if resorted to too frequently, threatens a misplaced emphasis. The aim should be, surely, not to prevent an offending corporation from carrying on business, but to prevent it from carrying on business in an illegal way.¹⁶⁴

Flexi-orders. An innovatory sanction, suggested by the Australian writer W. B. Fisse, which is designed to overcome some of the difficulties associated with the principles of corporate criminal liability, offers a number of possibilities for the control, through the criminal law, of misleading advertising practices.¹⁶⁵

The basis of the measure is a device in the nature of a prohibition order which would require activities to be stopped, or steps to be taken, to avoid the repetition of the offence in future. Unlike the prohibition order, however, the device would be extremely flexible and the courts would be given a wide discretion in tailoring an order to fit the circumstances of each case. Orders could be mandatory or prohibitory. At one extreme, an order might simply be made prohibiting the defendant from repeating a misleading advertisement. At the other extreme, a receiver might be appointed, at the defendant's expense, to implement corrective measures. In the middle range of cases, the defendant might be required, upon conviction, to prepare and lodge with the court a compliance report, containing measures which he would adopt to avoid repetition of the offence. It could also be required that the report include details of the defendant's

organizational structure and the names of the personnel who would be responsible for implementation of the proposals. The defendant's report would be vetted by the court. If unsatisfactory, it could be returned to him for improvement or an arbitrator might be appointed, at the defendant's expense, to prepare a report which is satisfactory. Once the court had approved the report, it would form the basis of an order against the defendant. Responsibility for breach of the order would vest, initially, in the individuals named in the report as having charge over implementation of the improvements. Liability would be imposed on the corporation itself only where it would be unfair, or not possible, to hold an individual accountable.

The proposal is appealing. It could, if adopted, overcome the sort of problem associated with corporate responsibility which was so inadequately dealt with in the Tesco case. It is well equipped to deal with situations where responsibility for an offence cannot be attributed to a single individual, but results from overall slackness in the system. Implementation of the measure in that sort of case would ensure that the slackness was eradicated. The device has possibilities for the control of misleading advertising in general, since, because of its flexibility, it could be applied in the removal of lingering misleading influences. It might, to this end, be framed around, or used in conjunction with, a publicity order of the type discussed above. Its other advantages is, of course, that it neatly avoids the problems associated with the imposition of large fines.

Restitution to Victims of Violations. While traditionally the objective of the criminal law has tended be thought of as primarily deterrence and that of the civil law as primarily compensation, economically speaking, these two objectives cannot be so neatly differentiated.

If the economically optimal level of a fine, for deterrent purposes, should be such as to tax away the gains from violation (multiplied by the probability of apprehension), then the prospect of having to pay compensation to victims of violations which approaches this level also acts a deterrent.

As the Law Commission of Canada in its Working Paper on Restitution and Compensation¹⁶⁶ pointed out, there are many advantages, both from the point of view of the vio-

lator and from the point of view of the victim, in moving the emphasis of the criminal law away from jail sentence or fines for many non-violent economic offences and towards a regime which forces the violator specifically to address, and redress, the impact of the violation on the victim. Moreover, there is already precedent for this in our Criminal Code (ss. 653-655) which allows a court, in certain offences, as an aspect of the sentencing process, to order the accused to make restitution or compensation to his victims.¹⁶⁷ We believe that these little used provisions, with some refurbishing to extend them to summary as well as indictable offences, and to classes of victims as well as individuals, could well be replicated in any regime of criminal sanctions applied to the trade practice field.

Indeed, this approach could well be carried further than the existing compensatory provisions of the Criminal Code. For example, in some cases an order of rescission or contract modification (e.g. in relation to an unconscionable contract clause) might be a perfectly appropriate element in a criminal sentence. There is a need to break out of a rigid, historical mind-set that conceives of possible criminal sanctions only in terms of fines or imprisonment. There is no magic quality to these sanctions and, as we have tried to show, in the present context they suffer from severe disabilities relative to other, more appropriate, sanctions.

The virtues of compensatory sanctions are obvious. They enable both deterrent and compensatory objectives to be met, in some cases, in a single set of proceedings, thus avoiding needless multiplicity of proceedings. It also enables a court to adjust the more conventional deterrent sanctions e.g. a fine, in the light of compensatory obligations of the violator, thus optimizing the attainment of both objectives.

Some administrative matters would need to be attended to if civil orders are to become an effective option in the criminal sentencing process. First, the administration of the orders might require a reference by the criminal court to a civil court to ensure that the order is being properly carried out. Secondly, adequate incentives need to be provided to ensure that an aggrieved consumer or class of consumers comes forward at the time of sentence, as s.653 of the Criminal Code envisages, to apply for a compensatory order as part of the sentence. We return to this issue of procedural

incentives in our final chapter.

Conclusion

The point which emerges strongly from the foregoing is that all indications point away from exclusive reliance on the criminal law and toward the introduction of an administrative scheme with a wider, more imaginative range of remedies for the control of advertising abuses.

Should control be extended beyond misleading advertising to cover specific areas of unfairness, as outlined earlier, the criminal sanction would clearly be inappropriate. Furthermore, its clumsiness as a regulatory device is evident even within the relatively narrow scope of the present legislation, for the doctrine of strict liability in combination with the principles of corporate criminal liability gives rise to a formidable conflict between the requirements of individual justice and the public interest. The conflict can be side-stepped, in the case of misleading advertising legislation, if less reliance is placed on the criminal law. Finally, the sanctions traditionally imposed within the criminal system are clumsy and inapposite when applied to advertising offences. This is, possibly the least of the problems associated with the criminal approach for, assuming the continued application of the criminal law in this area, the sanctions could be modified and extended to meet the needs of effective advertising control.

In this regard, we recommend that following conviction, a court be given a wide range of options in terms of the appropriate sentence. These might include a jail sentence, a fine, a prohibition order, a corrective advertising order, a restitutionary or compensation order, rescission or contract modification, or where compensation proves impracticable (e.g. because of difficulty in identifying members of the aggrieved class of victims) a divestment (unjust enrichment) order divesting the accused of the gains from violation in favour of the Crown.

The next chapter will be devoted to an examination of the possibilities offered by an administrative approach to advertising control. The discussion will centre around the measures which have been adopted by the Federal Trade Commission in the United States for it is there that the most

important advances have been made. Within this framework, however, reference will also be made to significant administrative measures adopted in other jurisdictions.

II. Footnotes

- 1 Canada: Combines Investigation Act R.S. c.C-23, ss 36, 37; U.K.: Trade Descriptions Act 1968 ss 1, 11, 14 (c.f. Fair Trading Act 1973, discussed infra, which introduces an administrative scheme based on regulation-making powers and prohibition orders); Australia: (e.g.) Unfair Advertising Act 1970-1 (S.A.) s.3.
- 2 The Business Practices Act R.S.O. 1974, c.131, The Unfair Trade Practices Act (Bill 21 Alta) 1975, Trade Practices Act Stat. B.C. c.96, 1974, all of which rely on administrative procedures and revitalized private rights of action for the prevention of unfair acts or practices and which fall back on the criminal sanction only as a last resort or as a supplementary measure. Ontario has for some time had legislation in which an administrative procedure, rather than the criminal sanction, plays a central role. The Consumer Protection Act R.S.O. 1970 c.82 (as amended) empowers the Registrar of the Consumer Protection Bureau, where he has reasonable grounds for believing that a seller or lender is making false, misleading or deceptive statements, to order the immediate cessation of the use of such material (s.47). Where the Registrar makes such an order, the seller affected is entitled to a hearing before the Commercial Registration Appeal Tribunal which may affirm or quash the order or substitute an order of its own (ss 47, 7).
- 3 R.S. c.C-23.
- 4 It is not intended to engage in a detailed analysis of the case law under ss 36 and 37. That task has already been performed. See: Cohen, "Misleading Advertising and the Combines Investigation Act" (1969) 15 McGill Law Journal 622; "Comparative False Advertising Legislation: A Beginning" (1972) 4 Adelaide Law Review 69; "False Advertising in Canada: An Overview of Sections 33C and 33D" in McGill University, Meredith Memorial Lectures (1971), 101; Swan, "Misleading Advertising: Its Control" (1971) 9 Alberta Law Review 310; Alyluia, "The Regulation of Commercial Advertising in Canada" (1972) 5 Manitoba Law Journal 97; Barnes, What the Courts Have Taught Us About Misleading Advertising (unpublished student essay, University of Toronto Law School, 1973);

Quinlan, "Combines Investigation Act - Misleading Advertising and Deceptive Practices" (1972) 5 Ottawa Law Review 277.

- 5 Just how effective the Division's activities have been has not, however, been determined: see Fitzgerald, "Misleading Advertising: Prevent or Punish" (1973) 1 Dalhousie Law Journal 246, 258-60.
- 6 Canada, Department of Consumer and Corporate Affairs, Misleading Advertising Division, Trade Practices Branch, Position Paper No. 1, (unpublished, December 27, 1973) 1-3. 1. An initial step beyond this field has however been taken. In November 1973 a pilot program of monitoring different classes of television advertisement was instituted, using existing departmental videotape facilities. The monitoring deals primarily with advertisements of major competitors in relatively concentrated consumer goods industries. In addition, greater use has been proposed of information obtained from the Federal Trade Commission's advertisement substantiation program where it relates to products marketed in Canada.
- 7 In general, advertising expenditures for television are 30 per cent higher than for the printed media; ibid., 1.
- 8 Howard and Hulbert, Advertising and the Public Interest, Staff Report to the Federal Trade Commission, (1973), 50-1.
- 9 See Law Reform Commission of Canada, Studies on Strict Liability (1974) 29, 70; Law Commission (U.K.), Codification of the Criminal Law: General Principles: The Mental Element in Crime (published working paper No. 31, 16 June 1970), 19. Cf Morris and Howard, Studies in Criminal Law (1964) 199-200, where it is objected that there is no evidence of any administrative problem.
- 10 See Fitzgerald, op.cit., Note 5, 260: this is, apparently, the view held by the Consumers Association of Canada.
- 11 The offence created by Combines Investigation Act R.S. c. C-23, s.36(1) is one of strict liability: R. v. Allied Towers Merchants Ltd. (1965) 2 O.R. 628. See also the case cited in Cohen, "Misleading Advertising and the Combines Investigation Act", op.cit., Note 4,

- 641, n.86. In R. v. Imperial Tobacco Products Ltd. (1971) 22 D.L.R. (3d) 51 (S.Ct Alta) Clement J. held that s.37(1) created two offences, one imposing strict liability, the other requiring guilty intent; Kane J. held that mens rea was not an element of the offence created by s.37(1); Johnson J. held that it was. In R. v. Firestone Stores Ltd. (1972) O.R. 327, the Ontario Court of Appeal upheld the view that s.37(1) creates two offences one of which imposes strict liability. In Alberta Giftwares v. R. (1973) 11 C.C.C. (2d) 513, the Supreme Court of Canada had the opportunity to examine the question but declined to do so, it having been found that the accused committed the offence intentionally. See generally Quinlan, op.cit., Note 4, loc.cit. The position is similar in the United Kingdom: see Trade Descriptions Act 1968; of the three misleading advertising offences created by the Act, (ss 1, 11, 14) only s.14 (relating to the provision of services) requires proof of intent. (Egan, The Trade Descriptions Act: The New Law (2nd ed., 1968), 16).
- 12 Law Reform Commission of Canada, op.cit., Note 9, 175. See also Law Commission (U.K.), op.cit., Note 9, 4 and generally Law Reform Commission of Canada, The Meaning of Guilt (Working Paper No. 2, 1974).
- 13 Ibid. See also Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 University of Chicago Law Review 423, 437, 444; Morris and Howard, op.cit., Note 9, 199; Williams, Criminal Law: The General Part (2nd ed., 1961), 259: "When it becomes respectable to be convicted, the vitality of the criminal law has been sapped."
- 14 Law Reform Commission of Canada, op.cit., Note 9, 141.
- 15 See Howard, Strict Responsibility (1963) 27.
- 16 Law Reform Commission of Canada, op.cit., Note 9, 18.
- 17 See James and Son Ltd. v. Smee (1955) 1 Q.B. 78 where Parker J. urged prosecutors to restrict their efforts in the case of strict liability offences to persons who actually deserve punishment or who would be induced by punishment to improve their business organization: see

Williams, op.cit., Note 13, 256.

- 18 Law Commission (U.K.), Codification of the Criminal Law: Strict Liability and the Enforcement of the Factories Act 1961 (published working paper No. 30, 1970) para. 32.
- 19 Law Reform Commission of Canada, op.cit., Note. 9, 27
- 20 Ibid., 28. See also Kadish, op.cit., Note 13, 443; Morris and Howard, op.cit., Note 9, 199.
- 21 Law Commission (U.K.), op.cit., Note 18.
- 22 Law Reform Commission of Canada, op.cit., Note 9, 88-9.
- 23 Ibid., 100-1.
- 24 Ibid., 91. Other factors in no way related to the advertiser's blameworthiness were also found to affect the decision in some cases. These included the triviality of an offence such that it was not worth prosecuting, unsatisfactory evidence and the fact that other prosecutions were pending against the advertiser for the same offence.
- 25 Ibid., 103-4.
- 26 It is interesting to note that a conclusion more or less along these lines was reached in the United Kingdom study of the factories legislation. It was found that the nature of the blame of which the enforcement authority tended to take account was wider than the traditional legal conceptions of intention and negligence. They were concerned not merely with allocating fault for a particular incident, but with wider aspects of behaviour: Law Commission (U.K.), op.cit., Note 18, paras 69-70. It was urged that this practice should be reflected in the law and that this would be achieved not by basing the legislation on the concept of negligence, but by imposing a statutory obligation on employers to comply with the reasonable requirements of the authority. Failure to do so would constitute an offence, available defences to which would be that the employer had done all he could reasonably be expected to do in the circumstances. Evidence would be directed more to the

steps taken by the defendant to remedy the situation than to his failure to comply with the directive as such. (Para. 71). The aim should be to secure compliance for the future rather than to punish for past failures to comply. (Para. 72). This proposal looks very like an administrative scheme, the central feature of which are the "reasonable requirements" of the authority.

- 27 Brett, An Inquiry into Criminal Guilt (1963). 121.
- 28 Ibid. It is true that the behavioural view of the criminal law, concerned as it is with the modification of those who commit anti-social acts, does not embrace the case against strict liability. It is concerned with the possibilities of controlling human conduct and the entertainment of excuses as to why the anti-social conduct occurred is generally inconsistent with this goal (see Packer, The Limits of the Criminal Sanction (1968)). But there are grounds for arguing that the sort of conduct caught by strict liability at its furthest extreme, being morally blameless, is not anti-social. In any event, the behavioural theory has been roundly criticized: e.g., ibid. 66, 112; Law Reform Commission of Canada, op.cit., Note 9, 17-8; Brett, op.cit., Note 27, 115.
- 29 Ibid. 121. It is said that attempts to do so may have the opposite effect - they may lead a defendant to neglect precautions he ought to take, on the basis that "one may as well be hanged for a sheep as for a lamb".
- 30 Howard, op.cit., Note 15, 25-6.
- 31 See Law Reform Commission of Canada, op.cit., Note 9, 169; Brett, op.cit., Note 27, 54; Kadish, op.cit., Note 13, 441-2; Packer, op.cit., Note 28, 110.
- 32 Brett, op.cit., Note 27, 122; Law Reform Commission of Canada, op.cit., Note 9, 18. See also Law Commission (U.K.), op.cit., Note 9; Howard, op.cit., Note 15, loc.cit.
- 33 Ibid., Chapter I.
- 34 Law Reform Commission of Canada, op.cit., Note 9, 35.

- 35 Ibid. 229-32.
- 36 Law Commission (U.K.), op.cit., Note 9, 6-7, 19.
- 37 Sweet v. Parsley (1970) A.C. 132, 150 per Lord Reid; 157-8 per Lord Pearce; 163-4 per Lord Diplock.
- 38 Trade Descriptions Act 1968, s.24.
- 39 (1934) 52 C.L.R. 100.
- 40 Ibid., 104
- 41 (1941) 67 C.L.R. 536, 541 per Dixon J. For a full discussion of the Australian doctrine, see Howard, op.cit., Note 15, Chapter 5; "Strict Responsibility in the High Court of Australia" (1960) 76 Law Quarterly Review 547. Later articles which dispute certain aspects of Professor Howard's analysis of the doctrine include Brett, "Strict Responsibility: Possible Solutions" (1974) 37 Modern Law Review 417 and Fisse, "Probability and the Proudman v. Dayman Defence of Reasonable Mistaken Belief" (1974) 9 Melbourne University Law Review 477, 483-7 (discussing the recent decision on the point of the Supreme Court of South Australia in Mayer v. Marchant (1973) 5 S.A.S.R. 567).
- 42 There has not been a consistent judicial reaction in Canada against the doctrine of strict liability. The honest and reasonable mistake of fact defence was actually applied by the Ontario Court of Appeal in R. v. Cusseau (1972) 2 O.R. 250. The case seems, however, to run against the general stream of Supreme Court decisions. In the Supreme Court, after an apparent revolt against the doctrine in Beaver v. R. (1957) 188 C.C.C. 129, it was restored to its full rigour in R. v. Pierce Fisheries Ltd. (1970) 5 C.C.C. 193. In Hill v. R. (1974) 14 C.C.C. (2d) 505, 512, Dickson J. (with Pigeon J. concurring) expressly rejected the defence of honest and reasonable mistake of fact.
- 43 The distinction between the operation of the doctrine of honest and reasonable mistake of fact and that of the due diligence defence is not clear. It was originally thought that the defence of mistake was only available

in cases of conscious mistake, based on reasonable grounds (as opposed to simple ignorance as to the existence of a state of facts): Howard, op.cit., Note 15, 88-95. If this were the case, the defence would be significantly narrower than a general defence based on the absence of negligence. The view has, however, been disputed: see Brett, op.cit., Note 41, 417, 427, 430. The decision in Mayer v. Marchant (1973) 5 S.A.S.R. 567 chips away at the alleged distinction between conscious (mistaken) belief and simple ignorance (unconscious mistake): Fisse, op.cit., Note 41, 487.

- 44 The view is not universally endorsed. It has been argued that a due diligence defence which imposes on the accused the legal (as opposed to the evidentiary) burden of establishing his innocence (by disproving negligence) is contrary to the basic principle of justice articulated in Woolmington v. D.P.P. (1935) A.C. 462. See Brett, op.cit., Note 41, 431. See also the observations of Lord Reid in Sweet v. Parsley (1970) A.C. 132, 150. Cf Lord Diplock's important judgment in that case, especially at 164.
- 45 Law Reform Commission of Canada, op.cit., Note 9, 28-9
- 46 Ibid., 30. See also, Stigler, "The Optimum Enforcement of Laws" (1970) 78 Journal of Political Economy 526, 532-3.
- 47 Fitzgerald, op.cit., Note 5, 261; Law Reform Commission of Canada, op.cit., Note 9, 144. The point is again neatly highlighted in Williams, op.cit., Note 13, 255, where reference is made to "the Draconic character which usually marks philanthropic legislation".
- 48 Law Reform Commission of Canada, op.cit., Note 9, 140.
- 49 For a list of the cases decided under ss 36 and 37, see the annual Reports of the Director of Investigation and Research, Combines Investigation Act. The most recent list at the time of writing is contained in Report of the Director of Investigation and Research, Combines Investigation Act for the Year Ended March 31, 1974, 78.
- 50 For general treatment of the law relating to corporate

criminal liability, see Williams, op.cit., Note 13, 854 ff; Leigh The Criminal Liability of Corporations in English Law (1969); Law Commission (U.K.), Codification of the Criminal Law: General Principles: Criminal liability of Corporations (published working paper No. 44, 30 June 1972), paras 4-13.

- 51 For discussion of the principles of vicarious criminal liability, see Williams, op.cit., Note 13, 266 ff; Leigh, op.cit., Note 50, 74 ff; Rose, "Vicarious Liability in Regulatory Offences" (1970) 44 Australian Law Journal 147; "Vicarious Liability in Statutory Offences" (1971) 45 Australian Law Journal 252; and the extensive writings on the topic of the Australian scholar, W. B. Fisse: "The Distinction between Primary and Vicarious Corporate Criminal Liability" (1967) 41 Australian Law Journal 203; "The Elimination of Vicarious Liability in Regulatory Offences" (1968) 42 Australian Law Journal 199 (part I); 250 (part II); "Vicarious Liability in Regulatory Offences" (1970) 44 Australian Law Journal 601.
- 52 For discussion of the principles of primary corporate criminal liability, see the works cited in n.50 and Heerey, "Corporate Criminal Liability: A Reappraisal" (1962) 1 University of Tasmania Law Review, 677; Fisse, "Consumer Protection and Corporate Criminal Responsibility" (1972) 4 Adelaide Law Review 113; Yarofsky, "The Criminal Liability of Corporations" (1964) 10 McGill Law Journal 142; Waddams, "Alter Ego and the Criminal Liability of Corporations" (1966) 24 University of Toronto Faculty of Law Review 145; Fien, "Corporate Responsibility under Criminal Law" (1973) 5 Manitoba Law Journal 421.
- 53 This distinction between primary and vicarious corporate criminal liability is not common to all jurisdictions. It certainly operates in the United Kingdom and in Canada, but the position in Australia is different. There, a corporation will incur criminal liability on the basis of a servant's act or state of mind if the servant's actions can reasonably be regarded as within the scope of his employment. This rule applies alike to crimes involving mens rea and to offences of strict liability, to acts done by inferior servants of the corporation and to those of superior servants. Howard,

Australian Criminal Law (2nd ed., 1970) 382-3. The leading authorities are R. v. Australasian Films Ltd. (1921) 29 C.L.R. 195 and Morgan v. Babcock and Wilcox Ltd. (1929) 43 C.L.R. 163. For a discussion as to whether the liability imposed under this doctrine is primary or vicarious, see Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability" op.cit., Note 51. The position in the United States is similar to that obtaining in Australia. There, the rule is that liability will be imposed wherever an officer or agent, in doing the acts complained of, was engaged in exercising corporate powers and acting within the scope and course of his employment, provided that he intended thereby to benefit the corporation: see Standard Oil Co. of Texas v. U.S. 307 F.2d 120 (1963); Leigh, op.cit., Note 50, 116. See American Law Institute, Model Penal Code, Proposed Official Draft s.2.07, for proposed reforms.

- 54 Mousell Bros. Ltd. v. London and North Western Railway Company (1917) 2 K.B. 836, 844 per Viscount Reading C. J., 845 per Atkin J.; Williams, op.cit., Note 13, 267, 269.
- 55 Glanville Williams has maintained that the principle is so restricted, i.e., to cases where an individual is given a licence to run a business and delegates the entire management of that business to a servant, the acts and mental state of the servant will be imputed to him: op. cit., Note 13, 270-3. To the extent that the delegation principle has in the past been applied outside this context, it appears that Williams' view may now be vindicated. In Vane v. Yiannopoulos (1965) A.C. 486 (a licensee case), the House of Lords refused to apply the delegation principle on the basis that the licensee had not entirely delegated the management of the business to the servant in question; in Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153, it was held that the appellant company had not delegated its statutory duty of supervision to the branch manager (see infra). For comments on these decisions, see, respectively, Leigh, op.cit., Note 50, 82 and Fisse, op.cit., Note 52, 113, especially 114.
- 56 See Williams, op.cit., Note 13, 273 ff.

- 57 R. v. Teperman and Sons Ltd. (1968) 2 O.R. 174, 182 per Schroeder J. A.; Fisse, "The Elimination of Vicarious Liability in Regulatory Offences", op.cit., Note 51; Smith and Hogan, Criminal Law (3rd ed., 1973) 114-5.
- 58 See, however, Leigh, op.cit., Note 50, 78.
- 59 (1917) 2 K.B. 836.
- 60 Ibid., 845
- 61 Ibid.
- 62 Ibid., 844-5 per Viscount Reading C. J.
- 63 See Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153, 189 per Lord Pearson, 195 per Lord Diplock. See also Green v. Burnett (1955) 1 Q.B. 78; Leigh, op.cit., Note 50. Glanville Williams' contrary analysis should be noted. He argues that the Mousell case should be regarded only as an intermediate stage in the development of corporate criminal responsibility and not as authority for the proposition that vicarious liability will be imposed in respect of all acts done by a servant within the course of his employment. He maintains that vicarious liability can be imposed only in the two limited circumstances outlined above and criticizes the decision in Green v. Burnett (1955) 1 Q.B. 78 on the basis that it paid insufficient attention to the problem of attributing the servant's actus reus to the principal - a problem which the scope of employment approach conveniently glosses over: op.cit., Note 13, 273-4, 280.
- 64 Mousell Brothers Ltd. v. London and North Western Railway Company (1917) 2 K.B. 836; Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153, 195 per Lord Diplock; Howard, op.cit., Note 15, 49-50. It is again to be noted that this rationale does not meet Williams' point that the only difference, in this context, between strict liability offences and offences requiring mens rea is that the former dispense with the mens rea requirement. They do not, however, dispense with the need to attribute the servant's actus to the master if vicarious liability is to be imposed: op.cit., Note 13.

- 65 (1973) 5 N.B.R. (2d) 394. See also R. v. Busy Bee Wine and Spirit Importers of Saskatchewan Ltd. (1922) 60 D.L.R. 415, 417-8 per Turgeon J. A.; Law Reform Commission of Canada, op.cit., Note. 9, 93. The position is, however, still not entirely clear. It has been noted that in England, the scope of employment test and the delegation principle have been used indiscriminately, in the case of strict liability offences, for the imposition of vicarious liability (Leigh, op.cit., Note 50. A similar confusion is evident in Canada. In R. v. Teperman and Sons Ltd. (1968) 2 O.R. 174, the Ontario Court of Appeal cited with approval the scope of employment test and then proceeded to uphold the conviction of the company on the basis of the delegation principle. The two are not the same (Leigh, op.cit., Note 50, 82-3). See also R. v. Piggly Wiggly Canadian Ltd. (1933) 60 C.C.C. 104, where neither principle was applied in imposing vicarious liability in respect of an offence committed under s.63 of the Weights and Measures Act R.S.C. 1927, c.212. Instead, the decision was justified by reference to broad considerations of public policy.
- 66 Reference should briefly be made to two misleading advertising cases which might be raised by way of objection to this assessment. In R. v. F. W. Woolworth Co. Ltd. (1974) 18 C.C.C. (2d) 23 (Ont. C.A.) it was held that the respondent could not be made vicariously liable under s.36, Combines Investigation Act. R.S. c.C-23, for price misstatements made on its premises by an independent vendor to whom it had leased space and granted permission to demonstrate and sell his wares. Although the decision might, in some respects, be regarded as regrettable when assessed against the policy considerations underlying the legislation, it is not inconsistent with the above analysis, for the basis of the decision was that the representor was neither a servant nor an agent of the respondent. He was either a lessee or a licensee and vicarious liability cannot be imposed in such circumstances. In R. v. Hillcrest Volkswagen Ltd. (1973) 9 C.C.C. (2d) 339 (County Court of Halifax, N.S.) it was held that a used car sales company could not be made vicariously liable under s.33D(1) (now s.37(1)) for a misleading representation made to a customer by its senior salesman. The relationship in that case between the representor and the accused was clearly that of employee and employer and it might have been antici-

pated that vicarious liability would have been almost automatically imposed, the offence having been committed in the course of the representor's employment. However, the Court treated the question as turning on s.45(2) (a) of the Act and held that since the accused had established that the representor had no actual authority to make the misrepresentation, the case against it must fail. The decision is clearly inconsistent with the general run of cases dealing with vicarious liability. The explanation for the divergence seems to lie in a misplaced reliance by the court on s.45 (as to which, see infra). In point of law, at any rate, the decision is probably wrong.

- 67 Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153; Fisse, op.cit., Note 52, 124.
- 68 (1915) A.C. 705.
- 69 Ibid., 713
- 70 (1944) K.B. 551. The decision was one of a trio of cases decided in 1944 which are all, to varying degrees, responsible for the evolution of primary corporate criminal responsibility. See also D.P.P. v. Kent and Sussex Contractors (1944) K.B. 146; and Moore v. I. Bresler Ltd. (1944) 2 All E.R. 515.
- 71 Yarofsky, op.cit., Note 52, 151
- 72 (1941) 76 C.C.C. 196.
- 73 E.g., R. v. Electrical Contractors Association of Ontario and Dent (1961) O.R. 265; R. v. St. Lawrence Corporation Ltd. (1969) 5 D.L.R. (3d) 263.
- 74 (1944) K.B. 551, 559 per Stable J.
- 75 (1927) 48 C.C.C. 63, 81 per Orde J.
- 76 (1957) 1 Q.B. 159, 172-3. The test has been described as more helpful than most, but "reliance upon such anthropomorphic conceptions as the 'brain' and 'nerve centre' and upon the distinction between 'primary' and 'secondary' organs implicit in the...statement can only

blunt or possibly obliterate the distinction between primary and vicarious corporate liability": Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability" op.cit., Note 51, 207.

- 77 Williams, op.cit., Note 13, 857-8.
- 78 Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153, 171 per Lord Reid. The same is true in Canada: see Yarofsky, op.cit., Note 52, 156.
- 79 See John Henshall (Quarries) Ltd. v. Harvey (1965) 2 Q.B. 233, 241 per Lord Parker C.J.
- 80 Tesco Supermarkets Ltd. v. Nattrass (1972) A.C. 153, 171. The more widely the line is drawn, the more closely primary corporate responsibility will approximate vicarious corporate responsibility: Fisse, op.cit., Note 52, 120.
- 81 (1972) A.C. 153.
- 82 Law Reform Commission of Canada, op.cit., Note 9.
- 83 For a discussion of the case in its early stages, see Note, "Enterprise Liability and the Guilty Employee" (1971) 34 Modern Law Review 220.
- 84 (1972) A.C. 153, 175 per Lord Reid; Denning L. J.'s metaphor advanced in Bolton (Engineering) Co. Ltd. v. Graham and Sons (1957) 1 Q.B. 159, 172-3 was cited with approval (at 171 per Lord Reid, 187 per Viscount Dilhorne).
- 85 Ibid., 193 per Lord Pearson.
- 86 Ibid., 180-1 per Lord Morris of Borth-y-Geste.
- 87 Ibid., 203 per Lord Diplock.
- 88 The decision was followed in R. v. Andrews Weatherfoil Ltd. (1972) 1 All E.R. 65.
- 89 Note, "A Blow Against Enterprise Liability" (1971) 34 Modern Law Review 676, 680; Muir, "Tesco Supermarkets,

Corporate Liability and Fault" (1973) 5 New Zealand Universities Law Review 357, 366: The defence should be open to a corporate defendant only where the commission of the offence was really due to the fault of another - a complete outsider, an independent contractor or perhaps a servant who deliberately disobeys instructions (367).

90 Fisse, op.cit., Note 52, 116, 119.

91 (1962) Q.B. (Que.) 666.

92 See Waddams, op.cit., Note 52, 150, where the decision is criticized on the ground that it represents a substantial departure from the theory expounded in Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd. (1915) A.C. 705: "It is one thing to have complete authority over a particular area of the company's activities, but quite another...to be 'the very ego and centre of personality of the corporation'."

93 (1967) 59 D.L.R. (2d) 6; affd (1968) 65 D.L.R. (2d) 260; affd (1968) 65 D.L.R. (2d) 286n.

94 (1969) 5 D.L.R. (3d) 263.

95 See n.89, supra.

96 (1969) 5 D.L.R. (3d) 263.

97 (1974) 4 W.W.R. 516 (Alta. Dist. Ct.).

98 Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability", op.cit., Note 51. The principal contention appears to be that there is no justification for extending the liability of a corporate employer for the acts of his servants beyond that which is imposed on the individual employer: (206); cf Fisse, op.cit., Note 52, where the author seems to change his views in some respects. See also Waddams, op.cit., Note 52, 153. Cf Edgerton, "Corporate Criminal Responsibility" (1927) 36 Yale Law Journal 827.

99 See Leigh, op.cit., Note 50, 105-7, where the decision in the civil case, The Lady Gwendolyn (1965) 2 All E.R. 283, which adopted an approach similar to that of the

Canadian decisions referred to above, is applauded. It is suggested that the adoption of such an approach into the criminal law would bring about a distinct improvement. See also, Law Commission (U.K.), op.cit., Note 50, paras 35, 39 which seems, tentatively, to advocate a similar approach.

- 100 Note, "A Blow Against Enterprise Liability", op.cit., Note 89, 680.
- 101 R.S. c.C-23.
- 102 (1949) O.R. 315.
- 103 Goldenberg, "Criminal Responsibility of Corporations" (1949) 27 Canadian Bar Review 461, 464; Leigh, op.cit., Note 50, 121-2, 126-7.
- 104 For what appears to be a misapplication of s.45 in the misleading advertising context, see R. v. Hillcrest Volkswagen Ltd. (1973) 9 C.C.C. (2d) 339, where the provision was, in effect, treated as imposing a rule that vicarious liability will only attach to an employer in respect of misleading advertising offences committed by an employee if the employee had actual authority to commit those offences. This approach led to the curious result (in point of law) that the defendant was able to escape conviction by leading evidence as to its system of information and to the honesty with which it conducted its business. The court treated this evidence as raising a reasonable doubt as to the representor's authority to make the misstatement. But the offence involved was, supposedly, one of strict liability.
- 105 See Gatley, Libel and Slander (7th ed., Chap. 18).
- 106 Kadish, op.cit., Note 13, 435.
- 107 Ibid., 425-6, 436. The criminologist Ross, writing at the turn of the century, labelled economic offenders "criminaloids". He defined the term as designating "those who have not yet effectively come under the ban of public opinion. Often, indeed, they are guilty in the eyes of the law; but since they are not culpable in the eyes of the public and in their own eyes, their

spiritual attitude is not that of the criminal." ("The Criminaloid" in Geis (ed.), White Collar Criminal (1968) 25, 26). He goes on to inveigh against the species with unbridled passion: "Often the reminiscent criminaloid, upon comparing his misdeeds with what his clansmen stood ready to justify him in doing, is fain to exclaim with Lord Clive, 'By God, sir, at the moment I stand amazed at my own moderation!' When the revealing flash comes and the storm breaks, his difficulty in getting the public's point of view is really pathetic. Indeed, he may persist to the end in regarding himself as a martyr to 'politics' or 'yellow journalism' or the 'unctuous rectitude' of personal foes or 'class envy'. in the guise of a moral wave." (32) See also the slightly more restrained case put by Sutherland, the leading pioneer in the field, in 'White Collar Criminality' and 'Is "White-Collar Crime" Crime?' both reproduced in Geis, 40, 353.

- 108 Dershowitz, "Increasing Community Control over Corporate Crime: A Problem in the Law of Sanctions" (1961) 71 Yale Law Journal 280, 289n.
- 109 Williams, op.cit., Note 13, 864.
- 110 Kadish, op.cit., Note 13, 434.
- 111 Ibid.
- 112 This much is evident from the success which the Misleading Advertising Division has enjoyed in securing compliance with its directives. Certainly not all advertisers were motivated to comply by a sense of public duty. Similarly, the size of the fines generally imposed for offences would not (one would think) be sufficient to induce large-scale co-operation. (As to the size of penalties, see infra.)
- 113 See the observations in Hannay, "Introduction to the Symposium on White Collar Crime" (1973) 11 American Criminal Law Review 817, 819. See also Geis, "Detering Corporate Crime" in Nader and Green (eds), Corporate Power in America (1973) 182, 188-9, where the results of a 1969 Louis Harris Poll are noted: a manufacturer of an unsafe automobile was regarded by respondents as

worse than a mugger (68 per cent to 22 per cent) and a businessman who illegally fixed prices was considered worse than a burglar (54 per cent to 28 per cent).

114 Kadish, op.cit., Note 13, 439.

115 Ibid., 445

116 It has been indicated that the few emperical studies which have been done in this area fail to indicate any simple relationship between the general attitudes of businessmen toward a given area of regulation and their willingness or propensity to violate the regulations. The only thing clear is that compliance and non-compliance are not wholly determined by whether persons subject to regulation approve of it: Ball and Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View" (1965) 17 Stanford Law Review 197.

117 Criminal Code, R.S.C. 1970 c.C-34 (as amended), s.647(b).

118 Ibid., ss 647(a). Amendments proposed to ss 36 and 37 would give the prosecution the option of proceeding either by way of summary conviction or on indictment, thereby giving increased flexibility to the range of available penalties: see the new s.36(6) provided for by Combines Investigation (Amendment) Act (Bill C-22, 1974), s.18(1). The maximum penalty for offences punishable on summary conviction is increased to \$25,000.

119 An indication of the range of penalties imposed under s.36(1) is given by the data collected by the Law Reform Commission of Canada in their study of the files of the Misleading Advertising Division. The results of the 35 cases randomly selected for analysis were tabulated (op.cit., Note 9, 105) as follows:

S.36 PROSECUTIONS
Convictions, Acquittals and Penalties

	Total	Acquitted	\$0-100	100+200	200+300	300+400	400+500	500+1000	Pro Orders
Full Sample	35	5	3	7	10	3	1	6	9 (25.8%)
Size of firm - Large/National (Av. fine-300)	6	-	-	1	2	-	-	3	2 (33%)
Small (Av. fine-200)	14	2	2	3	3	3	-	1	5 (35.8%)

(The figures in the last column refer to prohibition orders (as to which see below). They are expressed both in whole numbers and as percentages of the corresponding figures in the first column.)

120 See the table in ibid, at 106:

S.37 PROSECUTIONS
Convictions, Acquittals and Penalties

	Total	Acquitted	\$0-100	100+200	200+300	300+400	400+500	500+1000	Pro Orders
Full Sample	65	17	3	8	14	6	4	6	7 (30.8%)
Size of firm - Large/National (Av. fine-300)	10	4	-	-	1	2	1	2	- 2 (20%)
Small (Av. fine-200)	27	7	3	4	4	3	2	3	1 10 (37%)

The overall accuracy of these figures is borne out by the most recent list of proceedings and results under the Act, published by the Director of Investigation and Research: see Report of the Director of Investigation and Research, op.cit., Note 49, Appendix II.

- 121 Dershowitz, op.cit., Note 108, 285.
- 122 Stigler, "The Optimum Enforcement of Laws" (1970) 78 J. Pol. Econ. 526, 527. Dewees, "The Courts and Economic Regulation", in Courts and Trials ed. Friedland (1975) 119, 126. Breit and Elzinga, "Antitrust Penalties and Attitudes towards Risk: an economic analysis" (1973) 86 Harvard Law Review 693, 699; see generally Becker "Crime and Punishment: an Economic Approach", (1968) 76 J. Pol. Econ. 169.
- 123 Dewees, op.cit., Note 122, 126-7
- 124 In other words, the analysis ignores the fact that the deterrent potential of a fine will vary from offender to offender and from time to time. Some offenders - and at times, perhaps, all offenders - will balk in their pursuit of profits even where the anticipated gains exceed anticipated cost. It may not always be attractive to pursue a possible profit of \$25,000 even where the anticipated cost is only \$10,000. The point is put more technically by Breit and Elzinga. The variables of penalty size and probability of conviction will, respectively, have more or less impact depending on whether a particular offender is risk averse or is a risk preferrer. They posit two situations where the penalty in the first is ten times as high as that in the second, but where the conviction rate in the second is ten times as high as that in the first. They note that "for the risk averse person the disutility of the larger loss is more than ten times as great as the disutility of the smaller loss. For the risk preferrer, the larger loss disutility is less than ten times that of the smaller loss" (op.cit., Note 122, 699). They advance the interesting thesis that since American business executives are today more prone to be risk averse, an increase in the penalty size variable will have a greater deterrent impact than an increase in the probability of conviction. They accordingly advocate larger fines rather than an intensification in prosecution.
- 125 Dewees, op.cit., Note 122, 127.
- 126 Ibid. See also the discussion in Breit and Elzinga, op.cit., Note 122, 707-8. The approach would be inefficient

because the more disproportionate the penalty to the crime, the lower the marginal deterrent value of the penalty. If an offender will be executed for a minor assault and for murder, there is no marginal deterrence to murder. If an advertiser will be fined \$100,000 for misstating the regular price at which goods are sold, he might just as well engage in a really elaborate fraud - or rob a bank, for that matter: see Stigler, op.cit., Note 46.

127 Dewees, op.cit., Note 122, loc.cit.

128 Ibid. 17; Dershowitz, op.cit., Note 108, 146.

129 Stigler, op.cit., Note 46, 532-3

130 The further objection is sometimes raised that the imposition of fines on corporate defendants is unjust for the burden falls, ultimately, not on the corporation itself, nor on the guilty individuals within the corporation, but on the shareholders (see Williams, op.cit., Note 13, 863; Heerey, op.cit., Note 52, 683; Law Commission (U.K.), op.cit., Note 50, para 46-7). In some cases, there will be little injustice, for shareholders have, through their voting power, ultimate control over the appointment and dismissal of directors and are, therefore, appropriate targets for primary corporate liability. In other cases, however, the justification does not apply. In large companies, for example, the voting power of individual shareholders may be insignificant: only institutional shareholders will have any control over the directors (ibid. para. 46). Moreover, the justification assumes that it will always be the directors who are the guilty actors. At least in cases where the company has been found vicariously liable, this will not necessarily be so (Heerey, loc.cit.). There is some merit in these observations. They call, however, not for avoidance of the corporate fine, but for an alteration of the principles of corporate accountability. In the meantime, the theoretical injustice which the arguments expose is at least minimized by the fact that the cost to shareholders individually will nearly always be very slight (see Leigh, op.cit., Note 50, 149).

131 Criminal Code Reform Act of 1973 (S.1400), 93rd Cong.,

1st Sess. (1973), s.2201(c).

- 132 See Matthews and Sullivan, "Criminal Liability for Violations of the Federal Securities Laws: The National Commission's Proposed Federal Criminal Code, S.1, and S.1400" (1973) 11 American Criminal Law Review 883, 953-4. A typical difficulty with calculating net profit is whether a company's legal costs in defending itself at its trial for the offence in issue would be deductible.
- 133 Breit and Elzinga, op.cit., Note 122, 711
- 134 Of course, as the authors themselves recognize, there is no reason why corporations would be less likely to conceal profits for tax purposes than they would be in order to minimize anti-trust penalties. Accordingly, they suggest that tax returns should be used as a starting point, not as the ultimate reference, for assessing profits (ibid., 712).
- 135 See Dershowitz, op.cit., Note 108, 143; Fisse, "The Use of Publicity as a Criminal Sanction Against Business Corporations" (1971) 8 Melbourne University Law Review 107, 140, n.51.
- 136 See, e.g., Williams, op.cit., Note 13, 864.
- 137 Dershowitz, op.cit., Note 108, 285-6, n.17.
- 138 Fisse, op.cit., Note 135.
- 139 S.30(6). See Fitzgerald, op.cit., Note 5, 262.
- 140 See R. v. Canadian Safeway Ltd. (1974) 41 D.L.R. (3d) 264, 267 per Moore J. (S. Ct. Alta.). The imposition of prohibition orders was upheld as a valid exercise of the criminal law power by the Supreme Court of Canada in R. v. Goodyear Tyre and Rubber Co. (1956) S.C.R. 303.
- 141 Ibid.
- 142 Ibid., 268.
- 143 Ibid.

- 144 See the tables reproduced in nn 119 and 120 supra.
- 145 (1974) 18 C.C.C. (2d) 23, 36.
- 146 See Leigh, op.cit., Note 50, 156-7. It is argued that prohibition orders (or injunctions), if too readily available, may be imposed "in a spirit of punitive retribution". Since disobedience of an injunction can result in penalties far more drastic than those provided for the substantive offence, there is a danger that they will be used as a means of imposing penalties more severe than the legislature itself has seen fit to attach to the offence in issue.
- 147 National Commission on Reform of the Federal Criminal Laws, Final Report: Proposed New Federal Criminal Code (1971) s.3007.
- 148 See infra.
- 149 Trade Practices Act, Stat. B.C. 1974, c.96, s.16(1); The Unfair Trade Practices Act (Bill 21, Alta.) 1975, s.16.
- 150 In the Final Report of the National Commission on the Reform of the Federal Criminal Laws, it is noted that the Commission was not prepared to go further than recommending a sanction by which an offender would be required to give notice of its conviction. It was felt that a broader sanction envisaging "publicity" (presumably along the lines outlined above), as opposed to "notice" came too close to the adoption of a policy of approving social ridicule as a sanction (op.cit., Note 147, 276). This fear has, obviously, not been felt in the administrative context. It is hard to see why it should be given any more weight in the consideration of criminal sanctions - especially when the aim is not to ridicule, but to undo harm which the offender himself has caused. See also Packer, op.cit., Note 28, 362. The Law Reform Commission of Canada makes the point that publicity (corrective advertising) has a precedent in the law of libel, where the offender is required to publish a retraction of the offending statement: op.cit., Note 9, 146.

- 151 For a full discussion of the possibilities of, and the defects in, publicity as a criminal sanction, see Fisse, op.cit., Note 135.
- 152 Ibid., 128-30
- 153 Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill Law J. 263, 284.
- 154 See Fisse, op.cit., Note 135, 139-40.
- 155 Rourke, "Law Enforcement Through Publicity" (1957) 24 University of Chicago Law Review 225, 240-1. On the other hand, this would not necessarily be the case. Some firms in competitive situations may occupy marginal positions in the market and may therefore be driven to ignore such intangibles as public opinion; monopoly firms may fear that adverse publicity would attract government intervention.
- 156 Ibid.
- 157 At the risk of piling speculation on speculation, the further point might be made that the uncertain impact of publicity is not a defect but, rather, its greatest strength. Some individuals may over-react to the threat of adverse publicity and harbour ungrounded fears as to its likely effects: "even as a paper tiger, public opinion can be quite intimidating, and it is of the nature of its power that no one can be quite sure beforehand that the tiger is in fact paper". (Ibid., 239, n.54).
- 158 Law Reform Commission of Canada, op.cit., Note 9.
- 159 See Fisse, op.cit., Note 135, 122.
- 160 Some consumer legislation in the United States provides for such a remedy: see Cohen, "Comparative False Advertising Legislation: A Beginning", op.cit., Note 4. 78.
- 161 Leigh, op.cit., Note 50, 158.
- 162 Ibid.
- 163 Fisse, "Responsibility, Prevention and Corporate Crime"

(1973) 5 New Zealand Universities Law Review 250, 252.

164 Ibid.

165 Ibid. 266 ff. The concept is Mr. Fisse's. The name is, with apologies to him, ours.

166 No. 5, 1974.

167 The constitutionality of these provisions was upheld in Re Torek and The Queen (1974) 2 O.R. (2d) 228 (H.C.J.).

III. ADMINISTRATIVE REGULATION OF ADVERTISING

Introduction

It is important, when considering the various sanctions which have been evolved by the Federal Trade Commission for the control of advertising abuses, to keep in mind the policy ends toward which they are directed. It will be recalled that the Commission's statutory mandate is over "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce". The Commission is, naturally, still very much concerned with the prevention of deceptive advertising, but it has extended the scope of its operations to cover advertising techniques which are considered to be "unfair". Again, it will be recalled that that concept has to date been applied to advertising claims which lack a reasonable basis; to certain types of exploitative advertising and, very recently, to advertising techniques designed to foster artificial product differentiation. The underlying policy--the theme which unifies these efforts--is that product information is essential to informed consumer choice and that advertising should, if only to a limited extent, bear the responsibility for providing that information. Most of the remedies discussed below are directed, at least in part, to ensuring that that responsibility is met by advertisers.

However, before passing to an examination of the Commission's remedial measures, it is necessary to look briefly at the procedural context within which they operate.

Federal Trade Commission Procedure

Section 5(b) of the Federal Trade Commission Act empowers the Commission, where it has grounds for believing that a person is engaged in an unfair method of competition or an unfair or deceptive act or practice in commerce, and where it appears to be in the public interest to do so,¹ to issue a complaint and conduct a hearing with a view to deciding whether a cease and desist order should be imposed in respect of the grounds stated in the complaint.

This is the basis of the formal procedure open to the Commission, but the vast majority of the complaints which it issues are informally resolved. There is a three-tiered mechanism for the resolution of disputes. First, when a

Commission investigation has revealed a probable violation of the statute, the advertiser concerned may be contacted with a view to securing, either by oral promise or written assurance, his voluntary compliance with the legislation as interpreted by the Commission.²

Secondly, the Commission may, as an alternative to, or in the event of failure of, the voluntary compliance procedure, issue notice of a proposed complaint against the advertiser. The notice sets out the grounds of the complaint and the order to be sought. The advertiser is, at this stage, given a period of 10 days during which he may elect to consent to the proposed. In the event of his choosing to do so, he is required to enter into an agreement with the Commission whose provisions include the terms of the order, an admission of jurisdictional facts, a waiver of further proceedings by the Commission and a waiver by the respondent of rights of review. After the terms of the agreement have been finally settled between the parties it is placed on the public record for a period of 30 days as a provisionally accepted order. The Commission reserves the right to reconsider at the end of that period. The consent order procedure is regarded by the Commission as a privilege accorded to respondents, not as a right.³

Finally, should the respondent refuse to consent to the proposed order, the matter is set down for hearing before an administrative law judge (a Commission staff member). If, after the hearing, the complaint is found to have been sustained, the administrative law judge files with the Commission and serves on the respondent an initial order to cease and desist (the order these days may also include one of the innovative remedies recently evolved by the Commission). The initial decision becomes the decision of the Commission 30 days after service. Within 10 days after service, the respondent may appeal the decision to the full Commission.⁴ In reviewing initial decisions, the full Commission fills the role of an appellate court. The Act provides for a right of appeal from a decision of the Commission to a federal Court of Appeals.⁵

The court intervenes rarely in Commission determinations. With regard to review of the substantive question as to whether the grounds stated in the decision support the conclusion, it was held in Universal Camera Corp. v. NLRB

that:

Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the Court of Appeals. This court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.⁶

In reviewing the appropriateness of the remedy chosen by the Commission to deal with a practice found to have been unlawful, the principles enunciated in Jacob Segal Co. v. FTC are applicable:

The Commission has a wide discretion in its choice of a remedy deemed appropriate to cope with the unlawful practices in this area of trade and commerce. Here...judicial review is limited... The Commission has a wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.⁷
(italics-author's)

The only other gloss which has been placed on the wide discretion of the Commission to fashion remedies which it considers appropriate is that the remedies must be prospective--they cannot be punitive or retrospective.⁸ Insofar as it is frequently possible to categorize a remedy as punitive only by reference to its severity, it is sometimes said that this requirement is no more than a particular application of the rule that the remedy must bear a reasonable relation to the unlawful practices in issue.⁹

The unwillingness of the courts to interfere, in the process of review, with Commission discretion has been an important factor in encouraging the development of new and imaginative remedies for the control of advertising abuses.

The final point of procedure which should be noted is that, in the event of a consent or adjudicated order being breached, the Commission is empowered to commence a civil action, in court, for the recovery of a monetary penalty of

up to \$10,000 for each day during which the violation has continued.¹⁰ It is important to note that the Commission itself does not have the power to impose monetary penalties. This function remains solely within the province of the court and comes into play only after an order has been breached. It is also both of some importance and interest to note that under the Federal Trade Commission Improvement Act of 1975, the F.T.C. for the first time has been given the ability to proceed before the courts for civil penalties of up to \$10,000 (i.e. in effect fines) against suppliers who knew or ought to have known they were engaging in unfair or deceptive practices. This development underscores again the importance of examining criminal, administrative and civil sanctions not in isolation but as part of an integrated and balanced framework of sanctions.

The Remedies

Affirmative Disclosure. Most of the recently evolved remedies for the control of deceptive or unfair advertising are really only variations of the sanction for which express provision is made in the Act--the cease and desist order. The cease and desist order is simply a prohibition order or injunction which prohibits the respondent from engaging in the future in practices which have been found to be unlawful, or in similar practices.

The remedy of affirmative disclosure is one such variation. It was designed specifically to deal with a particular type of deception--misrepresentation by silence. To this end, the typical affirmative disclosure order prohibits the respondent from making certain claims unless he discloses facts, previously omitted, which are considered necessary to negate the misleading inferences to which express claims have given rise.

There are three principal areas in which the remedy has been invoked. First, it has been applied to protect consumer preferences. For example, in Kerran v. FTC,¹¹ the Court of Appeals upheld a Commission ruling that consumers have--and are entitled to--a preference for new, as opposed to re-refined oil products. It affirmed a Commission order that the respondent cease and desist from making claims which implied that its product was new or, alternatively, that he disclose in all future advertising for the product the fact that it was re-refined. Similar orders have been upheld in

cases where the Commission has found a consumer preference for products of domestic origin over foreign items. These orders require disclosure of the country of origin.¹²

Secondly, affirmative disclosure has been required of dangers associated with the use of certain products. The best known example of this application of the remedy is the Commission requirement that cigarette advertisers disclose the dangers to health involved in smoking.¹³

Finally, the remedy has been applied with the aim of counteracting beliefs widely held by consumers concerning the use or effects of advertised products. It has been invoked in this context irrespective of whether the belief was actively induced by the challenged claims or whether the advertising simply failed to correct a pre-existing and widely held misapprehension. Its application has been particularly evident in the case of advertising for non-prescription drugs. In J. B. Williams Co., Inc.,¹⁴ it was charged that respondent's advertising for its stimulant, Vivarin, falsely implied that the product was unique and induced the belief that it had extraordinary powers of rejuvenation. In fact, the primary active ingredient of the product was caffeine. The respondent accepted a consent order prohibiting the deceptions and requiring disclosure, in future advertising, of the caffeine content. A similar order was recently imposed on Benton & Bowles, Inc., makers of the analgesic Vanquish, requiring disclosure of the aspirin and caffeine content of its product.¹⁵ In an earlier action against J. B. Williams, Inc.,¹⁶ the Commission attacked respondent's advertising for its product Geritol, which was marketed as providing relief against tiredness resulting from iron deficiency anaemia. The Commission found that the advertising encouraged the erroneous belief in consumers that most tiredness results from iron deficiency anaemia and that, therefore, Geritol was an effective remedy against tiredness. The respondent was required to disclose, in future advertising, the fact that the majority of persons who experience tiredness symptoms do not suffer from iron deficiency anaemia and that, for these persons, Geritol will be of little benefit.

Although the gist of the remedy is that the advertiser furnish additional information, it has not, so far, been applied in furtherance of the ends of the philosophy of information. Rather, its single aim has, traditionally, been the prevention of deception. Theoretically, affirmative dis-

closure has been sought only insofar as it was necessary to counter, for the future, the deceptive tendency of earlier advertising. In short, the remedy was supposed to fulfil only a negative function. This limitation was imposed on the Commission by the Court of Appeals in Alberty v. FTC.¹⁷ In that case, the court reversed an order of the Commission requiring the respondent to disclose that a stimulant which it manufactured would not cure iron deficiency anaemia. The court held that in order to justify the imposition of such a remedy, the Commission must first find that failure to make the disclosure is misleading either because of the consequences from the use of the product or because of things claimed in the advertisement. It was held that the Commission's jurisdiction under the Act does not extend beyond the prevention of deception to policing the informative content of advertising. The Commission, in attempting to impose the remedy in the absence of a finding that the advertising was misleading, exceeded those bounds.

These apparent limitations did not, however, cause the Commission much difficulty in subsequent cases. It has avoided the problem simply by taking care to emphasize in its decisions one or other of the findings as to deception stipulated in Alberty. Reviewing courts, in their unwillingness to interfere with Commission discretion, have overturned none of these findings. In the J. B. Williams (Geritol) case,¹⁸ the facts were identical to those in Alberty yet the court, on review, upheld the Commission's affirmative disclosure order. Similarly, an affirmative disclosure order was upheld in Keele Hair and Scalp Specialists, Inc. v. FTC.¹⁹

More recent developments may have resulted in the disappearance of the limitations altogether. It will be recalled that in the Sperry & Hutchinson case, the Supreme Court affirmed the view that "unfairness" is a distinct and self-sufficient ground of complaint under Section 5, quite apart from "deception". Insofar as the Commission is now empowered to impose orders otherwise than on the basis that the acts in issue were deceptive or misleading, the strictures imposed by Alberty may no longer be applicable. The Commission could conceivably impose an affirmative disclosure order on the basis that the omission of particular facts from an advertisement was in itself an unfair act or practice. No affirmative disclosure order has, to date, been sought on

this basis, but if the development did occur, it would be difficult to set limits on the type and extent of informative content which the Commission could force on advertising through the affirmative disclosure device and by resort to the concept of unfairness.

The case against too rigorous an application to advertising of the philosophy of information should by now be clear. It is with this case in mind that it can strongly be argued that the limitations on affirmative disclosure imposed by the Court of Appeals in Alberty are valid and should be adhered to. It is to be noted that to retain such an approach would not be to deny affirmative disclosure a limited positive function. It has already been seen that there is a substantial overlap between the essentially negative function of preventing deception and the positive task of injecting additional informative content into advertising. The implications of affirmative disclosure illustrate nicely the nature of the overlap. Whether, in imposing the remedy in cases subsequent to Alberty, the Commission can be said to have undertaken the positive task is problematical. The cases most open to question in this regard are those in which affirmative disclosure was imposed to correct consumer misapprehensions concerning the advertised products which were not actively induced by the advertising itself. It might, for example, be said of the Geritol case that the order was directed more to the provision of background information concerning use of the product than to correcting prior misstatements. On the other hand, the distinction between this analysis and the Commission's charge that, without the background information, the claims were necessarily deceptive, is one of perspective rather than of substance. The point to be made is that the cases in the Geritol mould should be treated as representing the outer reaches of the remedy's application. Unrestricted resort to the remedy beyond those limits could result in the injection into advertising of more information than it could practically convey.

Within these necessary limits, affirmative disclosure has a useful role to play, as a constructive alternative to the cease and desist order, in the prevention of consumer deception. However, like the cease and desist order, it is directed primarily to the eradication of past deception. It can, as will shortly be seen, have only a limited impact in the removal of residual deception--misleading influences which linger into the future after termination of the chal-

lenged campaign. It was to meet this need more effectively that another variation on the cease and desist order was developed--the sanction of corrective advertising.

Corrective Advertising. The typical format in which corrective advertising is imposed consists of two separate orders. The first is a cease and desist order prohibiting the respondent from making claims which have been found to be deceptive or unfair. The second is an order requiring the respondent to cease and desist from advertising the product in respect of which the claims were made unless a stipulated proportion of that advertising contains, for a stipulated period, a disclosure of certain facts aimed at correcting the misimpression generated by the earlier claims.

Within the basic framework, the precise form of corrective advertising orders proposed and implemented since the remedy was first applied in 1971²⁰ varies markedly. The scope of the order is tailored to meet the particular requirements of each case. Some orders require the respondent to devote 25 per cent of his advertising expenditures in each medium (exclusive of production costs) for a stipulated period into the future, to promulgation of the corrective message.²¹ Others require an allotment of 25 per cent of respondent's advertising time (in the case of broadcast campaigns) or of space (in the case of printed advertisements) to the disclosures.²² Still others impose the more drastic requirement that 25 per cent of the time or space occupied by each advertisement be devoted to disclosing the requisite facts²³ or require, simply, that all the respondent's advertising for the product in issue carry the disclosure until expiration of the stipulated period.²⁴

The usual length of time during which the corrective disclosures are to be run is one year.²⁵ However, in some cases, a two-year period has been stipulated.²⁶ In what is perhaps the most stringent order imposed to date, RJR Foods, Inc.,²⁷ makers of the fruit beverage "Hawaiian Punch", are required to run disclosures for a one-year period and thereafter until a consumer survey is taken which gauges the need for continuing the disclosures. The disclosures are to reveal that, contrary to prior representations, respondent's product consists of no more than 20 per cent natural fruit juice. The order provides that the corrective advertising requirement will only expire at the end of the one-year period if a survey conducted by the respondent reveals, to the

satisfaction of the Commission, that either 67 per cent of current purchasers of fruit flavoured beverages, or 80 per cent of current or prospective purchasers of Hawaiian Punch products or 95 per cent of current purchasers of those products are aware that Hawaiian Punch contains no more than 20 per cent natural fruit juice. A similar, although more lenient, approach was adopted in the so-called "analgesic cases",²⁸ the orders in which would require respondents to run corrective disclosures, concerning their respective products, for a two-year period or until such time within that period as the respondents can demonstrate, on the basis of survey results, that disclosure is no longer required.

In some cases, the Commission goes no further than stipulating in the order the facts to be disclosed in the corrective messages. In these cases, respondents remain free to draft their own copy.²⁹ The tendency in more recent cases has been for the Commission to dictate the message and to append it to the order. The copy, drafted by the Commission, for the corrective message in the Warner-Lambert (Listerine) case reads as follows:

Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold or sore throats.³⁰

The Commission has, in the past, imposed no requirements as to the context in which corrective messages are to be run. In these cases, the disclosure appears in advertisements positively promoting the product. The most familiar example of a disclosure of this nature is the announcement run by ITT Continental Baking Co., Inc. concerning its product Profile bread:

I'm Julia Meade for Profile bread. And like all mothers, I'm concerned about nutrition and balanced means. So, I'd like to clear up any misunderstandings you might have about Profile bread from its advertising or even its name. Does Profile have fewer calories than other breads? No, Profile has about the same per ounce as other breads. To be exact Profile has seven fewer calories per slice. That's because it's sliced thinner. But eating Profile will not cause you to lose weight. A reduction of seven calories is insignificant. It's to-

tal calories and balanced nutrition that counts. And Profile can help you achieve a balanced meal. Because it provides protein and B vitamins as well as other nutrients.

How does my family feel about Profile? My children love Profile sandwiches. My husband likes Profile toast. And I prefer Profile to any other bread. At our house taste makes Profile a family affair.³¹

However, with the disclosure buried amid affirmative product claims, there is a danger that this format will realize little corrective effect. There is distinct possibility that the promotional claims will overshadow the remedial statements.³² Moreover there was, for a while a fear that skilful copywriting, combining disarming honesty with positive product appeals, might convert the sanction from a remedial measure into a device actually enhancing the advertiser's public image.³³ Accordingly, there are now a number of orders which stipulate that the corrective message must be run independently of positive promotion for the product.³⁴ A novel variation of this requirement was applied in American Home Products Corp.,³⁵ where the respondent was charged with having used deceptive demonstrations to illustrate the superiority of four of its household cleaning products over competing brands. More specifically, it was alleged that in conducting comparative demonstrations, respondent had failed to follow the instructions on the labels of competing brands, with the result that respondent's product performed better in the tests than the others. The order contains a cease and desist provision and includes a clause which reserves to the Commission the right to require, at a later date, that the respondent run advertisements which demonstrate what the results of the comparative tests would have been if they had been presented fairly and accurately in the first place.

The final major point of variation is that some orders direct the respondent to disclose the fact that the Commission has found prior claims to be deceptive,³⁶ while in others, this "scarlet letter" confession is not required.

Corrective advertising differs in form from affirmative disclosure in that the typical affirmative disclosure order gives the advertiser the option of halting the challenged claims or of disclosing facts stipulated by the Commission. Corrective advertising orders, on the other hand, impose the more stringent requirement that the respondent is

not to advertise his product at all unless he is prepared to make the stipulated disclosures.³⁷ There is also a difference in the underlying aims of the two remedies. While affirmative disclosure is directed to preventing the continuance of misleading claims by restructuring offending advertisements, corrective advertising is designed to facilitate the eradication of lingering misimpressions created by false advertising, even in cases where the advertising may have ceased.

The removal of residual deception is, supposedly, the primary aim of corrective advertising. The theory is that, even after misleading claims have been halted, they can have a "lagged effect". Though consumers may only be able to retain for a short period conscious recollection of specific claims, most advertising appeals create a favourable product association which is capable of being revived by the appearance of the product in subsequent commercials. Deceptive claims made in the past can, in this way, fortify--and taint--the persuasive effect of later, truthful, advertising.³⁸ In furnishing notice in subsequent advertising of past deceptions, the aim is to inform the consumer that his favourable attitude to a particular product may be founded on spurious considerations. Insofar as the disclosures are capable, in particular cases, of undermining brand loyalties engendered by false claims, the remedy is also designed to protect the interests of the respondent's more truthful competitors.³⁹

To the extent that it is the aim of corrective advertising to remove lingering misimpressions, proof of the residual impact of the advertisement must be tendered in each case in order to justify the imposition of the remedy. This feature represents a departure from the rule applicable to the normal run of misleading advertising cases that proof of actual deception is not required. The four complaints in which corrective advertising has been sought which have to date reached the full Commission reveal this additional burden to be a formidable stumbling block for complaint counsel. In none of the cases has counsel succeeded in satisfying the Commission that corrective advertising was required.

In Firestone Tire & Rubber Co.,⁴⁰ Coca-Cola Co.,⁴¹ and ITT Continental Baking Co., Inc. (Wonder Bread),⁴² counsel introduced expert witnesses, survey data and market information in an attempt to demonstrate the residual impact of the advertisements in question. In Coca-Cola, the com-

plaint was dismissed and in the other two cases, the Commission held that corrective advertising was not warranted. In Firestone, the Commission, while reasserting its power to order corrective advertising in appropriate cases, upheld the grounds on which the hearing examiner had rejected corrective advertising:

- (1) There has been a considerable lapse of time since the advertising occurred.
- (2) There is no reason to believe that any of the tires advertised as safe have enough tread left on them for the owners to believe they are safe.
- (3) The evidence shows that the residual effect of the advertising will be slight indeed by the end of this year...
- (4) Many of respondent's competitors have made safety claims through the use of brand names similar to 'Safety Champion' and are under no cease and desist order of any kind.⁴³

In Sun Oil Co. et. al.,⁴⁴ the administrative law judge, in his initial order to cease and desist, refused to impose corrective advertising in respect of prior claims by the respondents which falsely alleged that their gasoline provided more engine power than competing brands with comparable octane ratings. His principal reason for so doing was that the oil shortage which had arisen in the period between the issuing of the complaint and the date of the hearing had substantially altered conditions affecting the marketing of gasoline. He found that, in view of the current short supply of gasoline products, consumers had become more concerned with economy in fuel consumption than with power. In these circumstances, respondent's claims were, if not irrelevant, at least likely to have minimal residual impact on purchasing decisions.

It seems, then, that the major difficulties affecting the corrective advertising order centre around both the lack of empirical data demonstrating the impact and extent of residual impressions left by advertising on consumers and the inexactness of the sciences devoted to the study of these phenomena. The problems have, to date, largely been obscured by the willingness of respondents to forego formal hearings

and to submit to the consent order procedure. While this willingness persists, the difficulties associated with the substantive issues can be neatly avoided. The trouble is that the difficulties must by now be apparent to advertisers. The recent decisions of the full Commission can only act as an incentive to respondents to take their chances with adjudication. When and if this change of attitude occurs, the viability of corrective advertising as a remedial measure will readily be put on trial.

Removal of residual deception is, not however, the only aim of corrective advertising. An allegedly secondary purpose is to eradicate sales advantages which the respondent has gained as a result of the deception and to restore to participants in the affected market the shares which they enjoyed prior to the commencement of the offending campaign. In this respect, the remedy is supposed to perform a function similar to that of disgorgement of profits in the anti-trust context. The theory is that, whether the respondent exercises his option in favour of not advertising at all during the stipulated period, or whether he elects to run the required disclosures, he will incur a drop in sales, while his competitors will enjoy a corresponding increase.⁴⁵

As a corollary of this function, the Commission has tended not to seek corrective advertising in cases where there is a likelihood that irreparable injury to the respondent will follow. In such cases, the imposition of the remedy, far from restoring pre-existing competitive conditions, would hinder competition by removing one of the participants from the market. Moreover, the weaker the position of the respondent in the market, the lower will be the residual impact which his advertising could have. In short, the second factor--apart from reliance on psychological studies indicating the extent of residual deception in particular cases--taken into account by the Commission in relation to corrective advertising, is the market position of the respondent.⁴⁶ This suggests that firms enjoying monopoly power in highly concentrated industries may, in future cases, be prime targets for the corrective advertising device.

Apart from the problems inherently involved in adjudicating upon the appropriateness of the remedy in each case, it has sometimes been argued that the imposition of corrective advertising lies outside the jurisdiction of the

Commission.⁴⁷ The basic argument is that corrective advertising orders are primarily directed toward undoing the effects of past unlawful practices rather than to preventing future violations. They are, in other words, remedial and, therefore, offend against the fundamental prescription, noted earlier, that measures applied by the Commission must be prospective. The argument is, however, based on too narrow a perception of the thrust of corrective advertising. Viewed in a different way, corrective advertising is prospective for, as has already been seen, its principal purpose is, in most cases, to remove misconceptions, generated by past advertisements, which linger into the future. They proceed from the notion that deception does not necessarily cease upon termination of the offending advertisement and are designed to ensure that lingering misimpressions do not affect consumers' interpretations of later, truthful advertising.⁴⁸

The argument has more force in cases where corrective advertising is aimed at restructuring markets affected by deceptive practices. This is essentially a remedial, and hence a retrospective, function. It is also punitive for to succeed it must operate to deprive the respondent of his ill-gotten gains--it must have a punitive impact.⁴⁹ The argument is, however, not likely to be of much practical significance in curtailing the Commission's resort to corrective advertising. It is arguable that, in all cases to date, any impact which the measure has had on restructuring markets and redistributing ill-gotten profits has been merely incidental to the purpose of removing residual misimpressions. The nature of the measure is such that it will, in nearly every case, have some effect on the respondent's sales and profits. This being so, it is always open to the Commission to assert that its primary goal in applying the measure is the prospective, and therefore valid, one of eradicating residual deception. The difficulties involved in proving that the position was in fact otherwise will probably leave the Commission free to apply corrective advertising in market reorganization while purporting to act in the pursuit of other goals.

The point is important not only because it illustrates the ability of the Commission to exploit the ambiguous aspects of the remedy to overcome its jurisdictional limitations, but also because it reflects on the viability of corrective advertising when it is assessed in the abstract.

The attractiveness of corrective advertising over other measures for the control of misleading advertising depends largely on the ends toward which it is directed. It is subject here to the same observations which have earlier been made concerning use of publicity as a sanction. If the principal aim is to remove lingering misimpressions, it will be required to uncondition and re-condition the affected audience. Its effectiveness in this regard may depend on how persuasive it is relative to the original misleading claims. On the other hand, it is possible that in many cases there will be a considerable shock impact in the very fact of a name producer retracting prior assertions. Shock may be a workable substitute for persuasion in effective communication of the disclosure to consumers. The drop in sales which apparently followed the corrective messages run in connection with Profile bread lends support to this theory.⁵⁰

The approach adopted by the Commission in RJR Foods, Inc. may offer a solution to the difficulties involved in making corrective disclosures persuasive. It will be recalled that in that case the order provided for continuation of the corrective advertising until such time as the respondent could establish that the measure had had the desired effect. Yet it is, arguably, a draconic step to shift to an offender the onus of establishing the effectiveness of a remedy imposed upon him. In any event, there is at present very little known about the effects of corrective advertising in particular and of adverse publicity in general. Corrective advertising clearly has potential as a device for removing residual deception, but detailed research into how it operates will be required if its potential is to be fully realized.

Corrective advertising has less appeal where it is used as a device to deprive a respondent of ill-gotten profits and to restore the status quo ante in the relevant market. Where this is the goal, the problems of persuasion are multiplied, for the task is no longer the rather nebulous one of urging consumers to reassess their attitudes toward the offender and his product but must instead be actively directed to inducing changes in consumer behavioural patterns. Where the aim is the removal of residual deception, all that is required is that purchasers remake their purchasing decisions and re-analyze their brand loyalties in the light of the new information. Having done so, they may decide to switch brands or to avoid the product in question altogether or they may, in some cases, reaffirm their original purchase deci-

sions on other grounds. They may choose to ignore the fact that earlier statements were misleading if the product possesses other attributes which are sufficiently appealing to them. However, if corrective advertising is to succeed at all in market reorganization, it is not sufficient that it achieves this reassessment--it must further induce purchasers, having made their reassessment, to avoid the offender's product, for without a substantial downturn in the offender's sales, the measure will have minimal economic impact. Furthermore, if disgorgement and redistribution of ill-gotten profits are considered desirable ends of advertising regulation, corrective advertising is by no means the most efficient way of achieving them. A simpler course would, for example, be to fine the offender in an amount approximating his ill-gotten profits and to distribute the proceeds among his competitors according to a formula based on their market shares immediately prior to the deception. There would, as has been seen, be problems in ascertaining the amount of profit earned by the offender in violation of the law, but such a measure would have, over corrective advertising, the distinct advantage of certainty of impact.

It is in this respect that the two rationales advanced by the Commission for its resort to corrective advertising must be treated with caution. The Commission does not have the power to order disgorgement of profits or to impose monetary penalties. It is, hopefully, not unduly cynical to observe that it has, in the corrective advertising order, hit upon an indirect means of doing what it cannot achieve directly. To this extent, its so-called primary goal of removing residual deception--a function lying within its competence--may operate as something of a blind for putting into effect the supposedly incidental goal of market reorganization.

The point to be emphasized in all of this is that the Commission's application of corrective advertising to effect disgorgement of illegal gains is a tactical measure, designed to circumvent jurisdictional shortcomings. It cannot, therefore, be inferred from Commission experience that corrective advertising represents the best practical alternative for the redistribution of market power. It does not.

A limited corrective advertising procedure is included in proposed provincial legislation in Canada.⁵¹ It has also been tentatively recommended as a viable alternative to

the fine and prohibition order which are currently the principal remedies imposed under federal legislation.⁵² The foregoing discussion indicates that, in assessing the adequacy of these proposals, the following points should be kept in mind. First and fundamentally, it is essential to determine precisely what it is that the measures are intended to achieve. If the aim is market reorganization, then the certain impact of a fining measure aimed at depriving the offender of his gains from violation is preferable to the vagaries of a publicity measure. If, however, the principal goal is the removal of residual deception, it will, presumably, be necessary to establish workable criteria for distinguishing advertisements which have a residual impact from those which do not. Commission experience to date indicates that the task is a formidable one. It might, of course, be feasible to avoid the problem by imposing the remedy indiscriminately, but efficiency--if not justice--surely requires that some attempt be made, in each case, to link the claims in issue with consumer attitudes toward, and perception of, the product. At the very least, some weight should be accorded, in applying corrective advertising, to the following factors: the length of time which has elapsed since the advertisement appeared, the media through which it was promulgated, the length of time over which it was run, the size of the audience it reached, the audience characteristics and the blatancy of the deception.⁵³ The degree of market power enjoyed by the respondent is also a relevant factor, at least insofar as it reflects on the pervasiveness of his advertising. Variations in any of these factors may, on the one hand, afford grounds for withholding the remedy or, on the other, for adapting it--as the Commission has done--to meet the exigencies of particular cases. In the final analysis, these considerations are only particular instances of the overriding need for research into the operation and effects of publicity. Other jurisdictions would do well to mount research efforts either prior to or in conjunction with the implementation of corrective advertising proposals.

Advertising Substantiation. In a resolution first promulgated in 1971, the Commission announced its intention to require advertisers to submit on demand such tests, studies or other data concerning advertising claims as they had in their possession prior to the time when the claims were made and which purport to substantiate those claims. It was indicated that the information furnished to the Commission pursuant to the substantiation program would be made avail-

able to the public.⁵⁴ There are, according to the resolution, five principal considerations underlying the implementation of the program:

- (1) Public disclosure can assist consumers in making a rational choice among competing claims which purport to be based on objective evidence and in evaluating the weight to be accorded such claims.
- (2) The public's need for such information is not being met voluntarily by advertisers.
- (3) Public disclosure can enhance competition by encouraging competitors to challenge advertising claims which have no basis in fact.
- (4) The knowledge that documentation or the lack thereof will be made public will encourage advertisers to have on hand adequate substantiation before claims are made.
- (5) The Commission has limited resources for detecting claims which are not substantiated by adequate proof. By making documentation submitted in response to this resolution available to the public, the Commission can be alerted by consumers, businessmen, and public interest groups to possible violations of Section 5 of the Federal Trade Commission Act.⁵⁵

The program tends to focus on particular industries rather than on individual advertisers. Target industries are selected on the basis of such factors as their advertising dollar volume, advertising-to-sales ratios, industry size, the degree of concentration within the industry, the extent of consumer vulnerability to the type of claims being made and the retail price of the product in issue.⁵⁶ In addition, the program has to date concentrated on objectively verifiable claims regarding such product attributes as price, safety, performance and efficacy. Persuasive and non-informative appeals have not been questioned.⁵⁷

The first batch of orders to file special reports was issued, pursuant to the resolution, in the middle of 1971. Manufacturers of automobiles,⁵⁸ air conditioners,⁵⁹ electric shavers⁶⁰ and television sets⁶¹ were required to furnish substantiation for statements which they had made in the course of their advertising. Typically in issue were claims such as General Motors' assertion that the Chevrolet

Chevelle had "10 advantages" designed to keep it from "becoming old before its time", Sperry Rand's statement that the disposable blade feature of the Remington shaver prevents it from wearing out and the claim made by Fedders regarding its air conditioner: "RESERVE Cooling Power--only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days." The orders directed each corporation to file a special report with the Commission, containing the requisite information, within 60 days of the date on which the order was issued.⁶² Orders have subsequently been issued against a wide range of producers, including manufacturers of hearing aids,⁶³ pet foods,⁶⁴ anti-perspirants and deodorants⁶⁵ and acne preparations.⁶⁶

In processing the information obtained through the reports, Commission staff poses three threshold questions in respect of each response made: (1) Is the material submitted apparently relevant to the claim in question? (2) If the material is relevant, does it provide sufficient information to support the claim? (3) If the material is relevant and supports the claim with sufficient information, is the data itself relevant in terms of probable consumer experience?⁶⁷ If the answer to any of these questions is in the negative, the response is classified as insufficient to substantiate the claim.⁶⁸

Examples drawn from the Commission's analysis of the data obtained from the first batch of special reports are as follows. General Motors offered, by way of substantiation for its claim that the Chevrolet Chevelle has "10 advantages" a list of features including "full line of models", "body by Fisher" and such safety items already required by law as "two front head restraints" and "back-up lights". No explanation was given as to how these features constituted "advantages" over competing makes of automobile or how they would keep the Chevelle from "becoming old before its time". The material was classified by the Commission as being of questionable relevance to the claim in question.⁶⁹

The Ford Company's documentation for its claim that the 1971 LTD is "quieter than some of the world's most expensive cars" consisted of several six-year-old comparative tests between two used 1965 Fords and five used Rolls Royces, together with tests of a similar vintage comparing new 1966 LTD's with nine used European touring and racing cars. The materials did not discuss the effects, if any, of the age and

model-type on the noise levels of the cars tested. The material was classified as being relevant but as providing insufficient information to support the claim in question.⁷⁰

Also questioned by the Commission were claims by automobile manufacturers concerning the fuel consumptions of their various models. Tests submitted by way of substantiation for these claims were all conducted by professional drivers adhering to rigorous test standards. The Commission found that factors such as acceleration and deceleration rates, weather and temperature conditions, tire-pressure and shift-timing all influence fuel consumption rates. The tests were accordingly classified as tending to support the claims but as having a questionable relationship to normal consumer experience.⁷¹

Analysis along these lines led to the issuing of complaints against some of the manufacturers involved in the first application of the program. Cited were three manufacturers of air conditioners (Fedders, Rheem and Whirlpool) and two automobile manufacturers (General Motors and Volvo).⁷² The complaint in each case alleged that respondent engaged in an unfair practice in that it made claims for which it lacked a reasonable basis. All five complaints were subsequently sustained, some according to the consent order procedure and others on adjudication.⁷³ The various orders all require the respondents to cease and desist from making the challenged claims in the absence of a reasonable basis therefore. Where similar claims are made in future advertising, the orders provide that they must be supported by competent scientific tests, documentary records of which are to be kept by each respondent for a three-year period following the making of the claims. The Commission is, upon reasonable notice, to have access to the documentation at any time within the three-year period.

With the continued development and application of the substantiation program, further complaints have been issued. In May 1974, the Commission announced its intention to proceed against six hearing aid manufacturers who had made allegedly unsubstantiated claims concerning the scientific uniqueness of their products and their ability to benefit the wearer regardless of the type of hearing loss.⁷⁴ In July of the same year, the Commission accepted a consent order directed against K-Mart Enterprises, Inc.,⁷⁵ in relation to unsub-

stantiated claims made by the respondent concerning the strength and durability of its tires. The order is similar to those described above, except for a unique provision which not only requires that future comparative claims be adequately substantiated but also stipulates the degree of substantiation required. The order provides that scientific tests supporting comparative claims must do so with "not less than a ninety-five per cent confidence level when subjected to an appropriate statistical analysis". In other words, where a superiority claim is made for respondent's product over a competing brand of tire, the tests must indicate that 19 out of every 20 of respondent's tires could be expected to perform better than the competing brand. It is noted in the order that the 95 per cent figure was not arbitrarily arrived at. It is said to represent the widely accepted level of statistical confidence required for making unqualified generalizations from test data.

Despite the number of complaints which have arisen out of the substantiation program, it has not--at least in its initial stages--been an unqualified success. Three major threads can be seen to run through the rationales for the program advanced by the Commission in its 1971 resolution. The principal aim is, supposedly, to assist consumer purchasing decisions by creating a new source of product information. Secondly, it was hoped that the measure would stimulate competition by encouraging competitors to challenge unsubstantiated claims. And thirdly, the program was envisaged as assisting the Commission in detecting and proceeding against unfair advertising claims.

As to the first of these aims, early reports filed by advertisers in accordance with the program revealed its shortcomings as a source of information. The most serious difficulty was caused by the fact that almost 30 per cent of the material submitted was so technical in nature that it required special expertise, beyond the capacity of either the Commission or the average consumer to evaluate.⁷⁶ An additional complicating factor was the wide divergence in testing methods used by different manufacturers to substantiate similar product claims. Even where information was comprehensible it was, in those cases where comparative evaluation was impossible, of minimal value.⁷⁷ Perhaps partly as a result of these factors, a depressingly small number of consumers sought access to the material during the period when it was on the public record.⁷⁸ In an attempt to overcome these

drawbacks, the Commission announced in December 1972 that in future orders it would require advertisers to submit plain language summaries of their substantiating materials.⁷⁹ It was also announced that the program, in its future implementation would focus less on isolated product claims than on major advertising themes within particular industries.⁸⁰ The aim was to increase the relevance to consumers of information submitted and to broaden the scope of the program as a whole.

It still remains to be seen whether these modifications will improve the educative value of the program for consumers and encourage members of the public to make more use of the material submitted. Assuming that these practical difficulties can be overcome, the measure does hold out possibilities for the provision of product information. It offers an incentive to producers to make their advertising as informative as possible while still recognizing, and to a certain extent compensating for, the inherent inability of advertising to function exclusively as an educative device. Yet, by the same token, it must be realized that the provision of information is not, in itself, capable of producing any immediately discernible impact on buying patterns or market behaviour. Too much depends on how strongly consumers feel about being "educated", the extent to which they are prepared to seek out product information for themselves and how constructively they use such information in making their purchasing decisions. These factors are, at present, imponderables. At this stage, therefore, the only tangible benefit which can be said to flow from the program in its informational role is that it makes product data available to those consumers who want it. It cannot force the other results.

In the second of its aims--the stimulation of competition by encouraging advertisers to challenge the unsubstantiated claims of their competitors--advertising substantiation is rather less appealing. It was realized soon after the first orders were issued that the possibility of advertisers reacting in this way was remote. The principal disincentive lies in the fact that a businessman who attacked his competitors' claims would expose himself to retaliation in kind. The goal is for this reason unrealistic and seems to have been abandoned.⁸¹

It is, however, in the application of the program in furtherance of the third aim that its more far-reaching implications become apparent. Insofar as it provides con-

sumers with an alternative information source, its usefulness is evident, though limited. Where, however, it is used as a basis for the commencement of formal proceedings against advertisers, it can have a direct and immediate impact on advertising content and on the directions taken in promotional activity.

It will be recalled that the Commission applied the program in this respect in conjunction with the ruling in Pfizer that it is an unfair practice to make advertising claims which lack a reasonable basis. In effect, the major function of the program here is to reverse the onus of proof in formal proceedings. Complaints will be sustained against advertisers unless they can establish, in documentation submitted in response to Commission orders, that the claims in issue were supported by competent and reliable scientific tests. Direct pressure is in this way applied to advertisers to ascertain in advance the accuracy of their affirmative claims. This has the result of heightening the reliability of advertising itself as a source of information and thus of reducing both the need for an alternative source and the dependency of the substantiation program on the willingness of consumers to seek out information for themselves.

The relatively large number of complaints which have arisen out of the program highlights the usefulness of advertising substantiation as an investigatory device and seems to suggest that it is this third aim (the investigatory function)--not the first (the educative function)--which is paramount. It has been suggested that, as with corrective advertising, the so-called primary justification for the measure is, at least in part, a feature advanced to disguise the pursuit of other goals--in this case, the reversal of the onus of proof in formal proceedings.⁸²

Again--as in the case of corrective advertising--other jurisdictions contemplating the introduction of similar measures should give careful consideration to what it is they want to achieve. If the primary aim is to furnish a source of product information otherwise not provided in advertising, it may be unwise to infer too readily from the Commission's continued resort to the program that it has been successful in this respect. The limiting factors outlined above must, in particular, be kept in mind. If, on the other hand, it is sought to use the program to facilitate the detection and prosecution of dubious product claims, there are two addition-

al difficulties--one practical, the other theoretical--which should first be addressed.

The practical difficulty arises because of the delays involved in applying the device to particular cases. Of the five complaints issued by the Commission following receipt of the first reports in the middle of 1971, one was not disposed of until January of this year, two were settled early last year and two were resolved in 1973, more than two years after the claims first attracted the attention of the Commission. Delays of this order undermine the purpose of initiating proceedings, for there is little point in formally enjoying the continuance of unsubstantiated claims made in campaigns which are long defunct. Statutory authority has recently been extended to the Commission to apply for interim injunctions.⁸³ Resort to this device, at the point where analysis of special reports reveals a failure to substantiate, will provide at least a partial solution to the problem. In addition, the Commission recently announced measures aimed at streamlining the procedure associated with the program.⁸⁴ The most important of these changes requires advertisers to respond to orders to file special reports within 30 days of the date of the order, in place of the original 60-day period of grace. Other jurisdictions will need to consider these and other streamlining measures if they are to realize the full potential of advertising substantiation proposals.

The theoretical difficulty involved in applying advertising substantiation to the regulation of advertising content has already been adverted to. There are limits to the extent to which advertising can be made informative and to the degree of control which can appropriately be exercised over image appeals. Indiscriminatory application of the measure may result in these bounds being transgressed. Advertising substantiation could, for example, be used as a means of excising image appeals from advertising by requiring documentation of claims which are, inherently, incapable of substantiation. There is, therefore, a need to define with some precision the areas in which it would be proper for the measure to function. The Commission itself has, in this regard, restricted the orders issued pursuant to the program to objectively verifiable assertions concerning material product characteristics.⁸⁵ Similar restrictions may be in order in other jurisdictions. If an even sharper focus for the program is required, provision could be made for priority to be given to claims relating to health and safety features of ad-

vertised products.

Despite its attendant difficulties, advertising substantiation is, potentially, an important regulatory device. Overall, then, the conclusion here must be that it would be a desirable innovation in any jurisdiction seeking to broaden the basis of its control over advertising. This is so whether the aim is to use the program in its more limited role as an educative device or whether it is sought to use it as an investigatory tool to assist in the issuing and prosecution of formal complaints. Few of the problems which have emerged in its implementation by the Commission are irremediable.

Counter-advertising.

(i) *Introduction.* Broadcast regulation in both Canada and the United States imposes on radio and television licensees the fundamental obligation of providing, in their programing, a fair and balanced coverage of controversial issues of public importance. In Canada, this obligation finds expression in Section 3(d) of the Broadcasting Act which provides that:

the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern...⁸⁶

In the United States, the obligation is governed by policy directives evolved by the Federal Communications Commission pursuant to the powers conferred on it by the Federal Communications Act of 1934,⁸⁷ and which have collectively come to be known as the "fairness doctrine". The nature of this doctrine will be examined shortly.

The proposal has been made in both countries that the balanced programing requirement be extended to broadcast commercials and that individual members of the public be granted a right of access to the broadcast media to discuss important issues raised in advertising.⁸⁸ While there has been little official reaction to the Canadian proposal, its American equivalent has received a good deal of attention and was recently the subject of a special report issued by the Federal Communications Commission.⁸⁹ It is, for this

reason, intended to concentrate on the proposal as it was advanced in the United States. Observations made in this context will be equally applicable to the Canadian position.

(ii) *The fairness doctrine.* The theory underlying the Communications Act of 1934 is that the airwaves, being a limited resource, should be regulated in the public interest. The Act seeks to protect that interest by limiting broadcast licences to a period of three years and by rendering both their initial grant and their renewal subject to a finding by the Federal Communications Commission that "public interest, convenience or necessity will be served thereby".⁹⁰ This standard has, from the early stages of broadcast regulation been interpreted as requiring licensees to give broad coverage to public issues. The requirement crystallized into the fairness doctrine when, in 1949, the Commission issued a report dealing with editorializing by broadcast licensees.⁹¹

The report emphasized that broadcasters have a duty to the public to provide balanced presentation of controversial issues of public importance. The duty arises out of a concept which is fundamental to the system of broadcast regulation in the United States--that the broadcast licensee is a trustee, for the public, of the property in the frequency to which his licence relates. The public interest at stake is the need--the right--to be informed on all sides of important issues. The report stated that:

it is the right of the public to be informed rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.⁹²

The duty consists of a two-fold obligation: first, to devote a reasonable amount of broadcast time to the discussion and consideration of issues of public importance and secondly, to ascertain and seek out all responsible viewpoints on controversial issues and to afford the opportunity for those contrasting viewpoints to be heard.

These obligations form the basis of the fairness doctrine and are enforced under the broad pre-requisite to licence renewal that the licensee has operated his station in the public interest.

The crucial aspect of the doctrine, in the present context, is the second limb which only comes into play once the licensee has broadcast one side of a controversial issue of public importance. He is, at that point, required to afford reasonable opportunity for the discussion of conflicting views on that issue. However, the licensee is given, under the doctrine, a wide discretion both as to the issues to which he gives coverage in his general programming and to the means by which balance is to be achieved. The doctrine does not, in its traditional form, guarantee a right of access to individual members of the public to air opposing views. The licensee has the right to determine the format in which contrasting views will be presented and to select spokesmen for each point of view. The Commission has consistently refused to challenge licensees' judgment in these areas and has confined its review to the issue of whether the licensee acted reasonably and in good faith.⁹³

The one rider which has been imposed by the Commission on licensees' discretion is that they cannot consider themselves relieved of their fairness doctrine obligations simply because they are unable to secure paid sponsorship, in particular cases, for the appropriate presentation of opposing views. Where necessary, time must be made available free of charge.⁹⁴

In Red Lion Broadcasting Co., Inc. v. FCC,⁹⁵ the Supreme Court, in what proved to be a landmark decision, upheld the constitutionality of the fairness doctrine. It was held that the paramount interest at stake was the right of the public to be informed and to have suitable access to ideas. Insofar as the doctrine was directed to the preservation of that interest, it could not be regarded as abridging broadcasters' first amendment rights to freedom of speech and of the press--despite its undeniably restrictive impact on the content of broadcast material.

(iii) *Application of the fairness doctrine to commercial advertising.* The Federal Communications Commission has, as a rule, made little attempt to regulate advertising, preferring to leave control in that field to the Federal Trade Commission. With one isolated exception,⁹⁶ the fairness doctrine was not applied to commercial advertisements until the late 1960's.

In 1967, one John F. Banzhaf III petitioned station

WCBS-TV in New York, claiming that cigarette commercials broadcast by the station implicitly represented smoking to be "socially acceptable, desirable, manly, and a necessary part of a rich full life". In so doing, they ignored altogether the question of health and in this way raised one side of a controversial issue of public importance. Banzhaf requested that the station give him the opportunity, under the fairness doctrine, to air the opposing view. When the station rejected his petition, he lodged a complaint with the Federal Communications Commission.⁹⁷

The Commission held that, in view of the nature of the product which they promoted, the advertisements inevitably raised one side of an issue, irrespective of the form in which they were cast; that the issue which they raised, having been the subject of numerous medical studies and government reports, was sufficiently controversial to warrant application of the doctrine; and that the question of health was very much in the public interest. While the Commission refused to require the station to devote to the health issue an amount of time equal to that occupied by the broadcast commercials, it did order that some time, in the licensee's discretion, be made available for response. The decision was subsequently affirmed by the Court of Appeals.⁹⁸

In reaching its decision, the Commission was clearly aware of the possible ramifications for broadcast advertising. It attempted to relegate the cigarette commercial to a sui generis position by stressing the uniqueness of the product and the unusual dangers involved in its consumption. But the logic in these attempts was strained. It is, in fact, difficult to set any limits on the decision for it is arguable that nearly all advertising presents products in their most favourable light and studiously avoids reference to significant controversial countervailing costs.⁹⁹

This point was amply illustrated some years later when a group of environmentalists, known as Friends of the Earth, argued in a complaint to the Commission¹⁰⁰ that the Banzhaf ruling was equally applicable to oil and gasoline advertisements which implicitly and explicitly represented the products as efficient, clean, socially responsible and automotively necessary. In so doing, they ignored the contribution which these products made to air pollution; since pollution affects health and health is a matter in the public interest, the advertisements presented one side of a contro-

versial issue of public importance and therefore attracted the fairness doctrine. The Commission refused to extend the Banzhaf ruling. It again stressed the uniqueness of cigarettes and advanced the rather dubious distinction that, while the consumption of cigarettes is inherently dangerous, the normal use of other products, such as automobiles, is not. The real basis for the decision was, however, a feat that the unrestricted extension of the fairness doctrine to product advertising would undermine the commercial foundation of the broadcasting system by driving advertisers off the airwaves:

Were we to adopt a scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest.¹⁰¹

It might well have been the case that policy considerations dictated the need for a retreat from the position established by Banzhaf, but the Commission's reticence in Friends of the Earth was logically irreconcilable with the earlier decision. This inconsistency was highlighted, on appeal, by the Court of Appeals which reversed the Commission's ruling:

The distinction is not apparent to us any more than we suppose it is to the asthmatic who lives in New York City for whom increasing air pollution is a mortal danger.¹⁰²

It was held that:

Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of Banzhaf inescapable.¹⁰³

The court did not order that time be made available to the petitioner to respond, but remitted the case to the Commission for a determination of the question as to whether the station involved had fulfilled its fairness obligations in the circumstances by providing a balanced coverage of the relevant issues in its general programing.

Immediately prior to the hearing of the appeal in Friends of the Earth, the Commission was again requested to extend the fairness doctrine to product advertising.¹⁰⁴ The petition was directed against Standard Oil's promotion of its gasoline "Chevron with F-310", which again raised the pollution issue. The case was, therefore, similar to Friends of the Earth, except that Standard Oil's advertising expressly claimed that the product reduced air pollution. The Commission denied the petition, holding that the advertisements did not argue a position on a controversial issue of public importance. They merely advanced a claim for product efficacy. Although that claim did relate to a matter of public concern, it was not made in a spirit of debate and was, therefore, not a proper candidate for application of the doctrine. Again, this reasoning is difficult to reconcile with the position adopted in Banzhaf.

Finally, in Re Wilderness Society (ESSO),¹⁰⁵ the Commission relented. It held that advertisements by Standard Oil which discussed the need for development of Alaskan oil reserves and which claimed that the methods which it had devised for extraction and transportation of the oil would not harm the ecology raised one side of a controversial issue of public importance. It was further held, however, that, although the advertisements attracted the fairness doctrine, the network involved (NBC) had given sufficient coverage to the opposing viewpoints in its general programing and that it had, therefore fulfilled its obligations under the doctrine.

The confusion surrounding the applicability of the fairness doctrine to product commercials is evident. Reading between the lines of the various decisions, it is clear that the Commission argued itself into a corner in the Banzhaf case and has since been struggling to get out. It seems, at first glance, to have abandoned the struggle in the Wilderness Society case, but it may be possible to distinguish that decision on the basis that it related not to a product commercial but to a campaign designed to promote the advertiser's

public image. In that respect it might be said to resemble more closely an editorial or political message than the normal run of product advertisement.

The public interest in the retention of the commercial system of broadcasting may require restrictions on the application of the doctrine to advertising, but the Commission was not prepared to admit that the imposition of such restrictions was irreconcilable with the policy enunciated in Banzhaf. In 1971, the Commission announced its intention to hold an inquiry into the fairness doctrine and its underlying goals.¹⁰⁶

(iv) *The counter-advertising proposal.* During the course of this inquiry, the Federal Trade Commission submitted a proposal which advocated not only the wholehearted application of the fairness doctrine to product commercials, but also the more radical step that individual members of the public be accorded a right of direct access to the broadcast media to dispute advertising claims.¹⁰⁷ The proposal indicating four broad categories of advertising claims in respect of which counter-advertising would be appropriate:

- (1) Advertising asserting claims of product performance or characteristics that explicitly raise controversial issues of current public importance (for example, claims that products contribute to solving ecological problems).
- (2) Advertising stressing broadly recurrent themes affecting the purchase decision in a manner that implicitly raises controversial issues of current public importance (for example, food advertisements which may be viewed as encouraging poor nutritional habits, or detergent advertisements which may be viewed as contributing to water pollution).
- (3) Advertising claims based on scientific premises which are currently subject to controversy within the scientific community.
- (4) Advertising that is silent about negative aspects of the advertised product (for example, claims that a particular drug cures various ailments when competing products of equivalent efficacy are available at substantially lower prices).¹⁰⁸

In its request for the recognition of a right of direct access in members of the public to the broadcast media, the proposal was radical; it will be recalled that the Commission had never extended the fairness doctrine so far and had consistently emphasized that it lay in each broadcast licensee's discretion to choose an appropriate method for fulfilling his obligation to provide balanced coverage of controversial issues. The Federal Trade Commission's proposal, in its call for a right of direct access, implicitly recognizes the inability of the fairness doctrine, in its traditional form, to function as an effective vehicle for the debating of controversial advertising claims. Modern advertising techniques ensure that commercial messages are highly persuasive. They are also pervasive, for most broadcast advertisements take the form of short spot announcements which are repeated at frequent intervals. It would be futile to attempt to counter such announcements by presenting opposing viewpoints in the diluted form of general program coverage. Nor would it be sufficient to encapsulate the countering material in one or two isolated spot announcements. As the Court of Appeals observed in Banzhaf:

A man who hears a hundred 'yeses' for each 'no' when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed.¹⁰⁹

In short, if counter-advertising is to be at all effective, it must take the same form as the advertising which it is attacking. Specifically, counter-advertisements should be made in spot-form and broadcast with a frequency if not equivalent, at least proportional, to the original advertisement.

The first blow was dealt to the Federal Trade Commission's proposal by the Supreme Court in 1973 when, in Columbia Broadcasting System, Inc. v. Democratic National Committee,¹¹⁰ it held that the first amendment does not extend to individual members of the public a right of direct access to the broadcast media. The case was specifically concerned with the question as to whether broadcast licensees are entitled to refuse to sell advertising time to individual groups wishing to make political announcements or whether such a refusal would constitute a denial of the applicants' rights of free speech. In reaching its decision, the majority laid stress on the view that broadcasters enjoy, as journalists, a broad discretion in the selection of material to be aired over their frequencies. To the extent that the deci-

sion was premissed on this view,¹¹¹ it follows that if broadcasters can reject particular types of advertisement, they can also deny access to individuals wishing to dispute advertising claims. To this extent, the decision robbed the Federal Trade Commission's proposal of its constitutional basis and dispelled any feeling of compulsion which the Federal Communications Commission might previously have been under to implement it.

In 1974, the Commission concluded its enquiry into the scope and application of the fairness doctrine and issued a report detailing its findings. Doubtless encouraged by the Supreme Court's ruling in the CBS case, it reaffirmed its previous policy and refused to recognize a general right of access.¹¹² It rejected the Federal Trade Commission's proposal on a number of grounds. First, it reasserted the position which it had adopted in the Chevron determination, stating that the standard product commercial makes no meaningful contribution toward informing the public on any side of an issue. It does not raise controversial issues of public importance and to apply the fairness doctrine, or to allow access for response, to product claims would reduce the function of the doctrine to the level of triviality.¹¹³ In so deciding, it expressly reversed the policy which it had enunciated in Banzhaf and announced that in future the doctrine would only be applied to commercials which were devoted in an obvious and meaningful way to the discussion of public issues.¹¹⁴ Secondly, it was noted that the proposal, even if theoretically sound, was in fact unworkable, because the categories of advertisement to which it was suggested that counter-advertising be applied were so wide as to be non-existent. The proposal would catch all commercial messages, for it would be hard to envisage any product advertisement which did not, in some way, raise some sort of controversial issue, was not based upon some disputed scientific premise or did not remain silent about some negative feature of the product.¹¹⁵ Finally, the report noted that Congress had already provided adequate remedies for the control of deceptive advertising, in the form of the various sanctions available to the Federal Trade Commission. It was felt that if an advertisement was found to be misleading, the proper course would be to ban it altogether rather than to make its claims the subject of debate.¹¹⁶

(v) *Assessment.* There is little cause for regret in the Federal Communications Commission's rejection of the counter-advertising proposal, for it does not represent a viable solution to the problems associated with the control

of advertising abuses in general.

It is possible to distinguish three levels at which different advertisements embrace controversial issues.¹¹⁷ The first is represented by the "advertorial", or institutional commercial, which is designed to convey a favourable image of an industry or corporation rather than to sell a product. An example of this type of commercial is the promotion for Standard Oil which was in issue in the Wilderness Society case and which dealt with the development of Alaskan oil reserves and its ecological impact. Advertising of this nature almost invariably raises directly controversial issues of public importance and is, in many respects, indistinguishable from editorial and other announcements which are subject to fairness obligations. It is clear from the Commission's report that the fairness doctrine will continue to apply to this form of advertising.

The second level is represented by advertisements which, while addressing themselves solely to the desirability of a particular product, can still be said to raise implicitly controversial issues because, for example, the very use of the product is a subject of public debate. Cigarette (Banzhaf) and gasoline commercials (Friends of the Earth) fall into this category. On the third level is the normal type of product commercial which, either because it is deceptive or because it indirectly touches upon important public issues, might conceivably be a target for the doctrine. The report indicates the Commission's intention not to concern itself, in future, with advertising on either of these levels. The decision is justifiable on a number of grounds.

First, counter-advertising is, at heart, neither a preventative nor a remedial device. It might be concluded from a superficial assessment of the measure that it does offer possibilities both for countering misleading advertising claims and for providing the consumer with background information about advertised products. In fact, however, counter-advertising is no more than a vehicle for debate. If it has been established that an advertising claim is deceptive, or that there are dangers involved in the normal use of the advertised product, the appropriate course is to ban the claims in question, or to require clear disclosure of the danger in the advertising itself. There is no point in forestalling corrective action by exposing the topic to futile public discussion and argument. Where, on the other hand, substantial

doubts exist as to whether an advertised product is dangerous or a claim deceptive, broadcast debate which will alternately maximize and minimize those doubts is surely premature.

As a device for the provision of product information, the measure is no more appealing, for it envisages no controls on the information which will be provided. Its application is appropriate, as the Federal Communications Commission indicated in its 1974 report, only in relation to claims which are made in a spirit of debate and which directly raise controversial issues of public importance. The normal type of product commercial engages in debate only to the extent that is necessary to promote the efficacy of the product in question. It is difficult to see how debate on that level can be categorized as dealing with the controversial issues of general public importance for which the fairness doctrine was originally designed to cater. Undiscriminating application of the doctrine to product claims may serve only to distract from and discourage pursuit of its wider goals. On the other hand, all advertising can, when analyzed broadly, be regarded as indirectly raising controversial issues. For example, an extreme ground of complaint which might be levelled by some against advertising in general is that it encourages increased spending and excessive materialism. Yet issues such as these, although they may be controversial and deserving of public discussion, lie outside the terms of debate set by product advertising. The implementation of counter-advertising to enable debate on such broad terms may lead to a decline in the product information offered by advertising to consumers as advertisers abandon discussion of their products in order to respond to the wider charges which have been made against them. A shift of that order would hardly further the immediate economic interest of consumers in making informed purchase decisions.¹¹⁸

On a less theoretical note, the counter-advertising proposal is subject to the same observation which has been made concerning other, more plausible, innovatory measures in the advertising field: the proposal takes too little account of ultimate goals. If the primary aim of counter-advertising is simply to inform the public of other aspects of issues raised in product commercials, difficulties stand in the way of its effective implementation. It has already been noted that, to inform effectively, counter-advertisements would need to be in spot-form and repeated at regular intervals. This requirement conjures up the administrative nightmare of

finding sufficient broadcast time to accommodate the number of commercial messages necessary for a station's financial survival, as well as a plethora of counter-advertising announcements perhaps broadcast free of charge and repeated for the duration of the advertising campaigns under attack. If, on the other hand, the aim of the message is to counter-persuade--to draw consumers away from the advertised product--it becomes patently impossible, for the individual who takes it upon himself to respond to an advertising claim would probably need to employ psychological techniques as persuasive, and aesthetic devices as appealing, as those used in the original message.¹¹⁹ In this respect, the measure lacks the redeeming feature of corrective advertising: it lacks shock value, for it follows no formal finding of liability in the advertiser and represents only an individual's opinion as to the undesirability of particular product claims. For these reasons, the indiscriminatory application of the measure to advertising claims would result only in a pointless cluttering of the airwaves.¹²⁰

Finally, even if counter-advertising could have some impact in isolated cases, it depends too much for its overall effectiveness on the availability and willingness of individuals to take up the cudgels against particular advertisements. Any remedy, to be effective, must be relatively constant in both incidence and impact and not dependent on such uncontrollable variables as the force of public opinion from time to time and from issue to issue.¹²¹

Rule-making. Rule-making is, in a sense, something of a misfit in a survey of administrative sanctions, for its principal function is to define and particularize illegal acts rather than directly to apply remedial measures in specific instances. Viewed more broadly, however, it can be regarded as possessing some of the elements of a sanction, for the very formulation of a rule can have a deterrent effect. The deterrent impact springs from two sources. First, the mere fact that a rule has been passed is an indication of the regulator's intention to deal strictly with the conduct to which it relates: the passage of a rule provides a clue to future directions of regulatory activity and operates as a warning to affected industries.¹²² Secondly, substantive, binding rules, as will shortly be seen, have the effect of easing the burden on the prosecutor in adjudicatory proceedings to which they are applicable and of imposing correspondingly stricter requirements of proof on the respondent. The

greater likelihood of a decision adverse to the respondent can act as an incentive to him to avoid prosecution.¹²³ In any event, rule-making is, for those agencies in whom such power is vested, an important part of the overall process of enforcement and is inextricably associated with the imposition of sanctions on particular offenders. For these reasons, the topic merits consideration at this juncture.

Rules formulated by administrative agencies can take various forms and be directed to a number of ends. They may, on the one hand, fulfil an interpretative function. To this end, rules may be issued to clarify statutory standards in their application to particular industries or to particular types of conduct. Rules of this nature operate primarily for the benefit of the individuals regulated--they amount to policy statements on the part of the regulator, providing indications as to the directions of future regulatory activity and enabling the individual to gauge in advance the legality of his conduct. There is nothing controversial about resort to such rules--their validity is not dependent upon express grants of statutory power, for all American administrative agencies are inherently entitled to interpret the statutes under which they operate and to issue policy directives.¹²⁴ In Anglo-Canadian law, this power is of course limited by the requirement that administrative agencies must not fetter their statutory discretion by resorting to fixed rules of policy to such an extent that they ignore the merits of individual cases. There is, however, nothing to prevent an agency from evolving general guidelines against which it can assess the facts of individual cases which come before it.¹²⁵ Guidelines do not affect adjudicatory procedure, for complaints relating to conduct to which a rule is applicable charge violation of the overriding statutory standard, not of the rule itself. It still remains for the prosecutor to prove all of the issues --jurisdictional, legal and factual--associated with the application of the statutory standard. In other words, each case is, notwithstanding the applicability of an interpretative rule, treated on its individual merits, the policy statement functioning as no more than a preliminary expression of views.¹²⁶

On the other hand, rules issued by administrative agencies may be legislative rather than interpretative in nature. Rules of this kind do have the force of law. They have a direct impact on the course of subsequent adjudicatory proceedings, for once it has been established that a legisla-

tive rule is applicable to a particular case, the respondent is precluded from introducing evidence for the purpose of rebutting either the propositions of law enunciated in the rule or the underlying factual determinations on which the rule is based. The function of the prosecutor is reduced to that of establishing that the respondent's conduct violated the rule and the agency is thus relieved of the evidentiary burden of establishing, in each of a number of cases, that a particular practice violates the broad standards of the Act.¹²⁷ It is to be noted that rule-making effects a subtle change of emphasis from that obtaining in a case-oriented approach. Whereas the latter focusses only on the legal status of the person charged and of his acts or practices, the former is concerned with categories of conduct and demands certain behaviour from all parties to whom it applies.¹²⁸ Rule-making of this type is an essentially legislative function and therefore--unlike interpretative rule-making--depends upon a clear delegation of power in the enabling statute.¹²⁹

The Federal Trade Commission issues both interpretative and legislative rules. There are also interesting provisions in some other jurisdictions which confer power to issue rules of a legislative nature. It is proposed to examine some of the different manifestations of each type of rule.

There are two sorts of Commission procedure which fall into the category of interpretative rule-making. The first, and more informal, of these is the advisory opinion. Section 1.1 of the General Procedures provides that any person may request advice from the Commission with respect to a course of action which he proposes to pursue.¹³⁰ Such requests will be met except where the course of action is already being followed by the requesting party, where the same or a substantially similar course of action is under investigation or has been the subject of a Commission proceeding or where the Commission does not consider itself competent, in view of the technical nature of the request, to make an informed decision thereon.¹³¹ Advisory opinions do not have the force of law; they are subject to modification or rescission by the Commission should it subsequently appear that it would be in the public interest to do so.¹³² It is, however, provided that the Commission will not proceed against the requesting party in respect of any action taken by him in good faith reliance on the Commission's advice.¹³³

The advisory opinion is designed not to facilitate

the Commission's program of enforcement, but as a service to the persons who fall within its jurisdiction. It enables individuals to ascertain, in the face of the rather vague prohibition contained in Section 5 of the Federal Trade Commission Act, the legality of their proposed conduct and guarantees them immunity from prosecution for as long as the opinion remains in force. The one possible drawback in the procedure, from the advertiser's point of view, is that there is, apparently, a tendency for the Commission to be stricter in its advisory opinions than in litigation.¹³⁴ This tendency is, in some ways, understandable, for the tighter the controls which the Commission can indirectly impose through the informal issuing of advice, the greater will be the opportunity for raising standards within the industry involved and, presumably, the less the need for the institution of formal proceedings against members of that industry. On the other hand, too rigid responses by the Commission to requests for advice might encourage advertisers to avoid the procedure and, instead, to proceed with the conduct in question while pinning their hopes on not being caught or on obtaining a favourable finding in subsequent adjudicatory proceedings. There is therefore a need, if the procedure is not to be self-defeating, for the adoption of a balanced approach in meeting requests for advice.

The second type of interpretative rule issued by the Federal Trade Commission is the industry guide. Section 1.5 of the General Procedures provides that

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry.¹³⁵

Industry guides do not have the force of law, although Section 1.5 does go on to provide, rather unhelpfully, that violation may result in corrective action by the Commission under applicable statutory provisions. Although their precise status remains uncertain, the consensus seems to be that they amount to interpretative statements to business as to the position likely to be taken by the Commission in the event of litigation over the subject-matter to which they relate.¹³⁶ They thus perform a predominantly educative function, again for

the benefit of the industry members affected.¹³⁷

Industry guides are varied in their format; some cover conduct which is common to all industries and whose legal status the Commission has found it necessary to clarify. Examples are the guides against deceptive pricing,¹³⁸ the guides against bait advertising,¹³⁹ and the guides against deceptive advertising of guarantees.¹⁴⁰ Others have been directed solely against practices peculiar to a particular industry.¹⁴¹ Most typically, guides consist of a text commentary written in layman's language followed by specific examples of the practices in question.

It has been said that, although the guides have performed a useful educative function, they have suffered from an apparent unwillingness of businessmen voluntarily to comply with them. For this reason, it is probable that they will play only a subordinate role to the third type of rule issued by the Commission--the binding trade regulation rule.¹⁴² It is this new form of rule to which attention must now be given.

During the first 50 years of its existence, the Commission made no attempt to proscribe business conduct through the promulgation of binding rules under the Federal Trade Commission Act. Despite the fact that Section 6(g) of the Act conferred on it the power to make rules and regulations, it relied almost exclusively on the case-oriented approach contemplated by Section 5(a), employing the Section 6(g) power only for the purpose of making procedural and interpretative rules. The only binding rules promulgated by the Commission during that period were issued pursuant to express grants of power conferred by Congress in four specific areas: wool products labelling,¹⁴³ fur products labelling,¹⁴⁴ textile products identification,¹⁴⁵ and the identification of flammable fabrics.¹⁴⁶

However, in 1962, the Commission announced its intention to promulgate what have now come to be known as "trade regulation rules" and adopted formal rule-making procedures.¹⁴⁷ The Commission described the nature of trade regulation rules and its authority to issue them in the following terms:

For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and

regulations applicable to unlawful trade practices. Such rules and regulations... express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.¹⁴⁸

The Commission asserted that trade regulation rules have the force of law and may be relied upon in adjudicatory proceedings, provided that the respondent is given a fair hearing on the applicability of the rule to his case.¹⁴⁹ Where a rule is allegedly applicable to a particular case, the complaint charges violation of the rule itself, rather than of the prohibition contained in Section 5 of the Act. The precise impact of the rules on adjudicatory procedure is that they are determinative of the legal propositions and factual considerations on which they are based. The prosecutor is not required, in subsequent cases, to furnish proof of these issues and the onus is switched to the respondent to rebut the applicability of the rule to his case.¹⁵⁰ This might be done by establishing either that conditions had changed since promulgation of the rule or that special considerations affected the respondent's case which would justify a waiver of the rule's application to him.¹⁵¹

By resort to trade regulation rules, the Commission proposed to define with particularity its opinion of the substantive requirements of the law in a rule-making proceeding prior to adjudication. The procedures provide that a rule-making proceeding may be instituted either by the Commission on its own initiative, or pursuant to a petition lodged by any interested person.¹⁵² Rule-making proceedings consist of two parts--a preliminary private study conducted by the Commission and the final formulation of the rule with public participation. At the first stage, the Commission gathers, by way of investigation, studies and discussion,¹⁵³ information sufficient to support the rule and then formulates a tentative version of the rule. Upon completion of these preliminary steps, a hearing is initiated: the procedures provide for notice of the proposed rule-making to be published in the Federal Register and for opportunity to be given to interested parties to participate in the hearing through submission of written data or views or by oral argument.¹⁵⁴

After due consideration has been given to all relevant matters of fact, law, policy and discretion, including the arguments advanced by persons interested in the proceedings, a rule or order is adopted by the Commission and published in the Federal Register.¹⁵⁵ Rules can take effect only upon the expiration of at least 30 days after the date of their publication.¹⁵⁶

The Commission has promulgated only 21 trade regulation rules since the procedure was first established in 1962. The earliest of these cases were relatively trivial, dealing with uncomplicated fact situations and business practices which were easy to isolate and rectify. These early efforts included regulations which required accurate labelling of the size of sleeping bags,¹⁵⁷ regulations prohibiting use of the word "leakproof" in the advertising and labelling of dry-cell batteries,¹⁵⁸ and regulations prohibiting misuse of the word "automatic" to describe electric sewing machines.¹⁵⁹

Later applications of the rule-making procedure have, however, been more adventurous and it is possible to discern in these some of the broader themes associated with the Commission's policy on advertising. It is becoming increasingly evident that the procedure will have a major role to play in furtherance of the philosophy of information. Its principal advantage in this regard over case-by-case adjudication is that it provides a means of imposing affirmative disclosure requirements on entire industries, rather than on one particular individual. The first of the broader rules was issued in 1964 and required disclosure in cigarette advertisements and labelling of the dangers to health associated with smoking.¹⁶⁰ A rule promulgated in 1971 is based on a finding that knowledge of the octane ratings of the various brands of gasoline is essential to informed consumer choice and to effective comparative purchasing. The rule provides that it is an unfair method of competition and an unfair or deceptive act or practice for refiners and distributors to fail to disclose clearly and conspicuously on gasoline pumps the minimum octane number of the gasoline being dispensed.¹⁶¹ Again in 1971, a rule was promulgated which provided that it is an unfair method of competition and an unfair or deceptive act or practice in commerce for retail food stores to advertise products which they do not have in stock or to fail to have available for sale advertised items at or below the advertised price.¹⁶²

Even more recently, the Commission announced the initiation of a rule-making proceeding designed to remedy a problem which became apparent in the early application of the advertising substantiation program--the lack of uniformity in testing procedures offered by automobile advertisers as a basis for fuel economy claims. The initiation of the proceedings was justified by the Commission on the basis that the lack of uniformity frustrates comparison by consumers of the relative merits of competing makes of automobile and that many tests do not bear sufficient relationship to typical driving patterns to reflect the fuel economy which the average driver could expect. These considerations spring directly from the concept of unfairness as it has been applied, in association with the substantiation program, to claims made by advertisers which lack a reasonable basis.¹⁶³ The rule would, presumably, result in the provision of material information to consumers without the need for frequent resort by the Commission to the formal complaint procedure.

Finally, in November 1974, the Commission announced a proposed trade regulation rule designed to cover various nutritional claims made in food advertising. The proposed rule is directed, among other things, against emphatic nutrition claims (such as "Loaded with Vitamin A") and claims comparing the nutritional value of the advertised food with other foods (such as "Food X has more Vitamin A than Food Y"). The rule would prohibit the making of emphatic claims in the absence of a clear and conspicuous disclosure of the identity of the nutrient on which the claim is based and of the percentage of the United States Recommended Daily Allowance of the nutrient contained in a stated serving of the advertised food. It would prohibit the making of comparative nutritional claims unless (inter alia) the comparison is with an equal sized serving of a commercially available food, the identities of the advertised food and the compared food are clearly and conspicuously disclosed and the advertised food and the compared food normally serve the same dietary purposes.¹⁶⁴ Again, the proposed rule proceeds from the Commission's view that nutrition information is essential to informed consumer choice, that failure to provide such information constitutes an unfair and, in some cases, a deceptive act or practice and that the present failure of advertisers voluntarily to provide the information is sufficiently widespread to justify the imposition, through the rule-making procedure, of across-the-board affirmative disclosure requirements.¹⁶⁵

In National Petroleum Refiners Association v. FTC,¹⁶⁶ the Court of Appeals for the District of Columbia upheld the Commission's power to issue trade regulation rules. Specifically in issue in that case was the rule which required gasoline distributors to post minimum octane ratings on gasoline pumps. The court found in Section 6(g) of the Federal Trade Commission Act a broad grant of statutory authority to promulgate binding rules and regulations.¹⁶⁷ The conclusion was reached in the face of highly persuasive arguments that neither the plain meaning nor the legislative history of Section 6(g) justified such an interpretation and that the provision was intended to confer on the Commission no more than the power to formulate procedural regulations.¹⁶⁸ The court found the legislative history ambiguous¹⁶⁹ and refuted, almost summarily, the respondent's interpretation of Section 6(g). It held that Section 5(b) of the Act, which confers on the Commission power to impose cease and desist orders on individuals found to have violated the Act, could not be read as limiting the Commission's powers of enforcement to adjudication.¹⁷⁰ It then read both provisions together as justifying promulgation of Section 6(g) rules for the purpose of facilitating Section 5(b) proceedings.¹⁷¹ The only restriction imposed by the court on the Commission's power to issue trade regulation rules was that, since the statutory standard on which such rules are based is a legal standard, the rules themselves embody legal standards and are, therefore subject to full judicial review.¹⁷²

It has been pointed out that the effect of the decision in the National Petroleum Refiners case was not only to increase substantially the Commission's powers of enforcement of standards of truth and fairness in advertising, but also to change the nature of the Commission from an investigatory body with prosecutorial functions to a quasi-regulatory agency able to issue substantive rules which in effect create new types of illegal conduct.¹⁷³ The sweeping effects of the most recently proposed rules indicate that the Commission shares this perception of the shift in its functions. It will be interesting to observe, in the future application of rule-making, the extent to which it supplants case-by-case adjudication and its effectiveness, relative to the case-oriented approach, in securing widespread compliance amongst advertisers with standards of conduct stipulated by the Commission.

It is clear that rule-making is directed to the same policy ends as have emerged from the Commission's adjudi-

catory activity. The more sweeping rules are aimed at injecting into advertising a greater informative content, by imposing affirmative disclosure requirements and by stipulating the need for a reasonable basis for certain product claims. The observations made above concerning the implications of imposing a philosophy of information on advertising are therefore equally applicable to the rule-making procedure. It remains to examine in more detail the advantages of rule-making over adjudication but, before doing so, it may be instructive to look at rule-making procedures which have been developed in other jurisdictions.

The United Kingdom Fair Trading Act¹⁷⁴ makes provision for a comprehensive rule-making procedure. Unlike the position in the United States, however, the specialized agency established by the Act is empowered only to recommend the promulgation of rules. The actual power of promulgation is vested in the Secretary of State and is implemented through orders made by statutory instrument.

Section 3 of the Act creates a body known as the Consumer Protection Advisory Committee which is to be composed of industry representatives, representatives of consumer organizations and officials who have gained expertise in the application of consumer measures by virtue of their involvement in earlier legislative schemes. The Act focusses on "consumer trade practices" which are defined in Section 13 as practices associated with the supply of goods or services to consumers and which relate (inter alia) to the manner in which the terms and conditions of supply are communicated to consumers, to the promotion of goods or services and to the methods of salesmanship employed in dealing with consumers. Section 17 provides that where a consumer trade practice has, or is likely to have, the effect of misleading consumers or withholding adequate information from them concerning their rights and obligations under consumer transactions or of otherwise misleading or confusing consumers with respect to matters relevant to consumer transactions, the Director General of Fair Trading (a post created by Section 1) may make a reference to the Committee including, if he thinks fit, proposals for recommending to the Secretary of State the promulgation of regulations to cover the practice in issue. Section 14(1) vests power in the Secretary of State, other Ministers and the Director to refer to the Committee questions as to whether a particular consumer trade practice "adversely affects the

economic interests of consumers in the United Kingdom". Upon receipt of a reference, the Committee is to prepare a report for submission both to the Secretary of State and to the person by whom the reference was made. It is provided in Section 21 that the report is to contain the Committee's conclusions as to whether the practice in issue does adversely affect the economic interests of consumers and, if so, whether it does so by reason of the fact that it has or threatens one or more of the effects specified in Section 17. In the event of affirmative answers to these questions, the report is to state whether the Committee agrees with the proposals contained in the reference. Section 83 provides that if the report is made on the reference of a Minister, a copy is to be tabled in each House of Parliament. Where a report is so tabled, the Secretary of State is empowered, by Section 22, to make an order by statutory instrument giving effect to the proposals endorsed by the Committee. Where a report is not required to be tabled (that is, those reports made on the reference of the Director), Section 134(1) provides that orders giving effect to the proposals are subject to annulment pursuant to a resolution of either House of Parliament. Section 23 imposes, in the event of breach of an order, a fine on summary conviction of up to £400 or, on conviction or indictment, a fine of unlimited size or imprisonment for up to two years.

The scheme has a number of noteworthy features. In the first place, it is of interest that the underlying rationale is very similar to that which has been adopted by the Federal Trade Commission. It is clear from Sections 14 and 17 in particular that the scheme is founded on a philosophy of information: Section 17 includes reference both to practices which mislead consumers and to those which withhold adequate information from them. It is also clear that, as in the case of the Commission, the scheme envisages the broader attacks on advertising as governed by considerations which are predominantly economic in nature. There will doubtless be scope, as the rule-making procedures in the two jurisdictions are developed and applied, for comparative analyses of their effectiveness. In particular, it will be interesting to see whether the United Kingdom approach, which does not contemplate resort to such innovatory measures as corrective advertising and advertising substantiation,¹⁷⁵ will nevertheless be able to achieve, through reliance on rule-making, results comparable to those which lie within the reach of an imaginative case-oriented approach.

The second point to be noted concerns the procedural safeguards around which the scheme is constructed. In the case of the Federal Trade Commission, democratization of the rule-making process is achieved through the institution of hearings by the Commission, prior to formal promulgation of the rule, in which all interested parties are entitled to participate. The United Kingdom approach, on the other hand, seeks to guarantee procedural fairness to affected parties by the less direct method of making orders subject to the overriding approval of Parliament. It embodies a triple screening process to ensure fairness--in the first stage, the Director or a Minister is empowered to present to the Committee proposals for rule-making; in the second stage, the Committee may endorse, reject or modify the proposals contained in the reference; and in the third stage, depending on the origins of the report, orders are either made after the report has been tabled in Parliament or are subject to subsequent annulment by Parliament.

There do not, at this early stage, appear to be substantive grounds for preferring one approach over the other. The United Kingdom scheme does seem, at least on paper, to be productive of delays in the implementation of remedial measures but, then, the same criticism has been levelled against the Commission's procedure.¹⁷⁶ There may be a case for some streamlining of both schemes.

A preference for one approach over the other probably depends, in the final analysis, on one's views as to whether the existing legal machinery is, with some modifications, adequately equipped to enforce consumer protection measures or whether there is a case to be made for the establishment of a semi-autonomous body, such as the Federal Trade Commission, vested with extensive powers of investigation, prosecution and enforcement. Constitutional factors may, in some jurisdictions (including Canada), weigh heavily in the exercise of such an option. Beyond that, however, a conclusive choice cannot be made until concrete results begin to emerge through application of the respective programs.

The final point to be noted in the United Kingdom approach is that the safeguarding procedure is constructed in such a way that orders which owe their origin to the Director's initiative in referring matters to the Committee remain

in force unless and until they are subsequently annulled by Parliament. Their invalidation depends, in other words, on positive action by Parliament--orders are deemed to be valid and continue to cover particular practices until the contrary is expressly declared.

This last feature is notably absent from the regulation-making power provided for in Section 16 of the Business Practices Act which was recently enacted in Ontario.¹⁷⁷ The central provision of the Act is Section 3, which prohibits producers and advertisers from engaging in unfair practices. Section 2 defines unfair practices as including, but as not being limited to, a list of specific representations which are categorized as being either false and misleading or unconscionable. The lists in Section 2 are not exhaustive and Section 16(1)(c) empowers the Lieutenant Governor in Council to make regulations adding to them. The scheme is similar to that created by the Fair Trading Act, in the sense that the power to promulgate rules is vested in the executive rather than in a specialized agency. However, the rule-making power provided for in Section 16 diverges from the United Kingdom scheme in situations where rules are passed without prior reference to Parliament. Section 16(2) provides that rules may be made while the Assembly is recessed, but stipulates that such rules expire automatically upon prorogation of the next succeeding session. In other words, whereas the rules passed under the Fair Trading Act remain valid unless and until positive action is taken by Parliament, Section 16 rules are invalidated in the absence of subsequent positive action by Parliament.

It is possible, in this context, to make at least one concrete observation concerning the relative viability of different rule-making procedures--the United Kingdom approach is, in this respect, clearly preferable to the Section 16 procedure. While it is possible to sympathize with the view underlying Section 16 that individuals should not be subjected to ad hoc regulation by executive action and that their interests should be represented, in some form, in the passage of laws by which they are to be governed, the format adopted for securing fairness is conducive only to uncertainty and inconsistency. Section 16 will result, in the event of Parliament's failure through pressure of work or otherwise to formally validate existing rules, in certain forms of conduct being illegal one moment and legal the next. Moreover, the invalidation of rules will, in cases of parliamentary inadver-

tence, bear no relation to the urgency of the need for which they were originally designed to cater. Where rules expire in this way, while the original need for them continues, they will have to be promulgated anew. In the interim, individuals will remain free to engage in conduct which may result in substantial injury to consumers.

In short, the conclusion must be on this point that if rule-making under consumer legislation is to be effected through application of existing legal processes, rather than be express delegation of power to an independent agency, and if such rules are to be subject, in the interests of fairness, to invalidation at all, automatic rescission should be avoided. With regard specifically to the Ontario legislation, the rule-making procedure would be much improved by the implementation of a screening process similar to that for which provision is made in the Fair Trading Act.

The case for reliance on rule-making measures in advertising legislation depends ultimately, of course, on the advantages which such a procedure has over a case-oriented approach. It is therefore necessary to enquire whether there are benefits conferred by rule-making which could not be attained by reliance on adjudication alone.

The first, and most obvious, attraction in a rule-making approach is its even-handedness. The effectiveness of adjudication is most suspect where the practices in issue are widespread. In those situations, regulators working on a case-oriented basis can adopt one of two approaches. Either they can focus their endeavours on a few of the individuals involved, in the hope that the imposition of remedies in isolated cases will act as deterrent for the rest. Or they can institute a chain of formal complaints, proceeding against each actor in turn. As to the first alternative, it will not always be the case that the issuing of an order against one individual will deter another from engaging in similar practices. The order may, for example, be framed very narrowly, with the result that its applicability to persons other than the respondent is minimal or, at best, uncertain. Others may elect to continue in their line of conduct in the hope that the terms of the order will subsequently be confined strictly to the facts of the case in which it was issued.¹⁷⁸ As to the second alternative, the process is time-consuming and wasteful, for it involves the repeated litigation of substantially similar issues.¹⁷⁹

These difficulties can be minimized by rule-making, for directives embodied in a rule are immediately and equally applicable to all persons engaged in conduct to which the rule is directed. Admittedly, rule-making cannot be regarded as the ultimate solution to problems such as these. For one thing, consolidation of complaints in the adjudicatory process may produce similar results. For another, the mere issuing of a regulation does not necessarily guarantee its effectiveness--it may still be necessary to proceed against individuals who violate the rule.¹⁸⁰ On the other hand, the very promulgation of a rule can, for reasons already outlined, have at least some deterrent impact on the individuals to whom it is directed. Moreover, the issuing of a rule has the secondary effect of reducing the number of issues to be canvassed in adjudicatory proceedings. Accordingly, even where proceedings are necessary subsequent to the issuing of a rule, they will be much more easily disposed of. As for consolidation, resort to the process may not always be practicable--this might be so where, for example, there are a large number of participants in the industry involved or where the challenged practice is prevalent in more than one industry. On balance, therefore, these considerations do support the view that rule-making is a more efficient instrument for the control of widespread practices than is adjudication.

The second point in favour of rule-making over adjudication is concerned with the development of public policy and is, in a sense, related to the foregoing. Adjudication is, by its nature, primarily concerned with the resolution of issues which are of immediate relevance to the parties. The judicial function of presiding with impartiality over a contest between individual litigants is, at least theoretically, incompatible with the regulator's overriding mandate of protecting the public interest as a whole.¹⁸¹ The result may be that the wider issues raised by a case are ignored. Where this occurs, policy development will be fragmentary, for it becomes dependent on the accretion of one relatively narrow finding on another.¹⁸² Conversely, where administrative agencies do succumb to the temptation to utilize adjudicatory proceedings as a vehicle for policy-making, the narrowness of the issues central to the proceeding may result in distortion of any wider ruling which might be made.¹⁸³ In other words, the result may be the emergence of new policy, with wide-ranging ramifications, founded on a very narrow enquiry.¹⁸⁴

Rule-making can obviate these difficulties, for its

focus is not on an isolated dispute, but on the challenged practice itself and on the interests of all members of all industries affected. It is geared to ensuring that due consideration is given to all of the issues--immediate and far-reaching--which are raised by the proceeding.

This last point leads into the third advantage of rule-making. Where rule-making proceedings centre around a public hearing, they offer greater scope for individuals likely to be affected by the determination to air their views and to participate in the formulation of policy.¹⁸⁵ The growing recognition, particularly by the Federal Trade Commission, of the right of interested parties to intervene in adjudicatory proceedings, goes some way to meeting this need, but the extent to which the right can be given effect must be limited to prevent distraction from the issues with which the proceedings are immediately concerned.¹⁸⁶

Finally, rule-making can operate to the benefit of those regulated, for it can reduce vagueness surrounding the statutory mandate and enable individuals to determine with more certainty the legality of their conduct.¹⁸⁷

In the interests of analysis, the assumption has been made in the foregoing that rule-making is an alternative to adjudication. That, of course, is not really true. Rule-making will never entirely supplant the case-by-case approach. In the first place, the case in favour of rule-making is strongest where challenged practices are widespread and are sufficiently static to allow for effective prohibition by codified policy determinations. Rule-making may be inappropriate for the resolution of relatively narrow issues, or for the implementation of policy which is in a constant state of flux.¹⁸⁸ Secondly, even where rule-making is appropriate, it will be more effective when used in combination with, rather than instead of, adjudication. Both interpretative and legislative rules can perform important educative functions and aid in the clarification of the law in its application to particular cases. The educational function can only supplement--not replace--resort to formal measures of enforcement. Legislative rules can, in addition, expedite the course of adjudicatory proceedings by reducing the number of issues requiring proof in each case. It is probably fair to say that this--the procedural aspect--is, for the regulator, the principal attraction in resort to rule-making. Where this is so, rule-making,

far from posing a threat to the case-oriented approach, actually ensures its survival by heightening its efficiency.

Preclearance and Advance Rulings. In concluding this review of administrative measures for the control of advertising abuses, some reference should be made to preclearance. Preclearance is a variant of the normal type of rule-making procedure and, in particular, of the advisory opinion. It is a process by which advertisements are screened, prior to publication, in order to ensure their conformity with certain standards.

While the Federal Trade Commission's enforcement activities do not include extensive pre-publication monitoring of commercial messages, such a function is performed by various independent bodies, such as the broadcast networks and the National Association of Broadcasters.¹⁸⁹ In Canada, extensive preclearance procedures have been implemented by the Canadian Radio-Television Commission, under the Broadcasting Act, ¹⁹⁰ with a view to regulating the content of advertisements for alcohol¹⁹¹ and for food, cosmetics and drugs,¹⁹² and for childrens advertising. The applicable broadcasting regulations posit strict standards for promotional activity in these fields, which relate to such matters as the maximum permissible duration of commercials, the material which may be depicted in the commercial and the type of appeals which may be made. The regulations dealing with the advertising of beer, for example, prohibit appeals designed to promote the general consumption of beer and allow only those claims which are directed to changing brand preferences.

The Commission periodically issues guidelines to supplement the regulations and to underscore features to which advertisers, broadcasters and reviewing officials should give particular attention.¹⁹³ At one stage in the history of preclearance for food and drug advertising, these guidelines became so specific as to be comic in their triviality. They prohibited references in advertising to a long list of medical conditions including "pyorrhea", "pimples", "bad breath" and "constipation" and to such offensive topics as "fleas, bed-bugs and body lice".¹⁹⁴ These guidelines have since been supplanted by more general standards, but they do indicate that in an extreme form, that preclearance borders on a censoring measure. Unless the criteria for censorship reflect prevailing community attitudes, the whole process can attract ridicule. On the other hand, in the case of cosmetics and drugs,

the C.R.T.C., in collaboration with the Health Protection Branch of the Department of National Health & Welfare, performs a valuable function in preclearing broadcast advertisements that may give rise to safety or health questions. The C.R.T.C. also presently preclears food advertisements, in collaboration with the Consumer Fraud Protection Branch of the Department of Consumer & Corporate Affairs in relation to the accuracy of references to ingredients and to the efficacy of claims made for a food product. Otherwise, purely economic loss caused by misleading advertising in these areas is left to be policed directly by the Department of Consumer & Corporate Affairs under the misleading advertising provisions of the Combines Investigation Act.

Apart from the activities of the C.R.T.C., various independent bodies--most notably the Canadian Association of Broadcasters--operate preclearance procedures over areas, such as children's advertising,¹⁹⁵ which extend beyond matters relevant only to the promotion of particular products.

Preclearance is similar to rule-making in the sense that the creation of standards, at least where an official body is involved, is comparable to the promulgation of regulations. It differs from rule-making in the important respect that whereas a rule will only be enforced against a particular advertisement after an infraction has occurred, preclearance prevents infractions before they arise by ensuring that only those advertisements are published which conform to the standards which have been set. It operates, in this respect, in a fashion similar to the advisory opinion, the principal difference between the two measures being that the latter is designed primarily to assist the individual in assessing the legality of his conduct and is set in motion only upon application by the individual to the regulatory agency. Preclearance is aimed at the prevention of undesirable advertising claims and is uniformly applied to all advertising which falls within its terms of reference.

In that it is preventative rather than remedial, preclearance is a superficially attractive measure for the control of advertising abuses. However, the scope for its application in the prevention of misleading and unfair advertising in general can only be a limited one. It is a cumbersome device for, unlike the normal run of remedial measure, it does not lend itself to selectivity. In a comprehensive screening process, all advertising claims must be scrutinized,

not simply those which are immediately suspect. Monitoring of this kind may be appropriate for particular types of advertising which, either because of the product they promote or of the audience to which they are directed, can be regarded as falling into special categories. However, the establishment of a comprehensive preclearance program over advertising in general would require an enormous financial outlay and a vast contingent of reviewing officials. The problems become all the more formidable when it is considered that regulatory policies are expanding to embrace the economic, social and psychological contexts in which advertising operates. The costs of implementing a preclearance scheme would, in these circumstances, probably be prohibitive.

By way of summary, then, it can be said that there are three situations in which preclearance is an appropriate device for the regulation of advertising. First, it can be used to enforce special standards for particular types of advertising, such as advertising directed at children or advertising dealing with products whose use raises health issues or is otherwise the subject of controversy within the community. Secondly, it is a useful mechanism by which broadcasters and publishers can meet their responsibilities of ensuring that they do not promulgate material which is contrary to law. Finally, resort to the measure, at an unofficial level, by industry associations may serve to raise the standards of the industry as a whole and to reduce the need for official remedial intervention. As a general prescription for advertising abuses, however, it does not represent a viable alternative to remedial measures in general or, in particular, to the more traditional form of rule-making procedure. On the other hand, advisory opinions of the kind presently provided both by the F.T.C. in the U.S. and the Federal Department of Consumer and Corporate Affairs in Canada pursuant to its compliance program seem a useful service to business and avoid unnecessary subsequent enforcement activity. Obviously these opinions cannot be binding on the courts in subsequent adjudications. However, we consider that they should be published on a regular basis (probably with the applicant's name deleted) and if a pattern emerges from a body of them, generalized informal industry guides could be evolved and published as an indication of the enforcement authority's likely position on given issues. When these become firm enough, obviously they should be advanced to the final stage of formal regulations having legal force so that they can be complied with in the confidence that compliance absolutely precludes all future public

or private enforcement proceedings.

Conclusion

The principal focus in the foregoing analysis of administrative measures for the control of advertising has been on the way in which they operate to protect the consumer from abuses which have already occurred, or have already been generated, at the point where the order is imposed. It has, for example, been seen that affirmative disclosure and advertising substantiation can be applied to remedy informational deficiencies in advertising and to assist consumers in making informed purchase decisions; corrective advertising was discussed primarily with a view to assessing its ability to correct lingering misimpressions generated by earlier advertising; and the cease and desist order was seen to function as a consumer protection measure by prohibiting an advertiser's continued resort to a misleading or unfair practice.

Yet the remedial function is, as has been seen, only one of the aspects which should be evident in regulatory activity. Equally important are the preventative goals of deterring the offender from engaging again in similar conduct and others in a position similar to the offender from offending at all. It is therefore necessary to fit the administrative measures canvassed above into a general framework of deterrence.

The first point to be made is that administrative measures cannot effectively function in a vacuum. Provision must be made for the imposition of sanctions for breach by an advertiser of an order which has been made against him. It is at this stage of the administrative process that the principles relating to the fine become relevant. It has been argued that the traditional approach to levying monetary penalties does not usually realize the full deterrent potential of the measure and that the shortcomings in the fine will not always be resolved by imposing exorbitant amounts. However, fines related to the economic size of the offender's business operations and which are designed to ensure that, at the least, he is deprived of the profits which he has reaped as a result of his violation, can carry sufficient sting to operate effectively as a deterrent. Accordingly, provision might be made in an administrative scheme for the imposition, in the event of breach of an order by an advertiser, of fines calculated by reference, in the first instance, to the extent

of his ill-gotten profits and, as an overlay, to the seriousness of his offence. It might also be appropriate to include provision for imprisonment of corporate officers responsible for the breach. Precedent for such an approach is to be found in Section 30(6) of the Combines Investigation Act which imposes penalties for the breach of prohibition orders.

Within such a framework, the administrative order would ex hypothesi operate as a special deterrent, for it expressly forbids repetition by the offender of the challenged conduct. The wider the order is drawn, the more effective it can be in this regard. In most cases, the mere issuing of an administrative directive will be sufficient to deter repetition by the advertiser of the violation. The scheme would also act as a deterrent to the less scrupulous offender, for it embodies a real threat of stringent economic and penal sanctions in the event of breach of an order. The closer the supervision of compliance with administrative orders, the more immediate this threat becomes. These features will, in the majority of cases, also perform the function of general deterrence. Most traders will take pains to avoid engaging in conduct which might result in the issuing of administrative directives against them. (The strength of this observation depends, of course, on the efficiency with which the regulatory agency exercises its prosecutorial function.) Others would be deterred by the consequences which follow disobedience of an order imposed on them.

The only situation which this analysis overlooks is that of the fraudulent or fly-by-night operator who might be attracted by the profits to be earned in a one-time killing. If the unscrupulous offender is assured of a relatively high return from engaging, until he is caught, in illegal conduct, he will not be deterred by the threat of an administrative order. Once proceedings are instituted against him, he can terminate his operation, pocket his gains and retire from the scene. The imposition of an order would, in cases of this sort, be redundant.

Where the administrative scheme is operating efficiently, the incidence of such cases can be reduced--the more quickly proceedings can be instituted against violations, the lower will be the return to the offender and the less attractive the prospects of a one-time killing.

Apart from urging efficiency in administration, how-

ever, one way of dealing with the problem might be to make provision in the scheme for the imposition in the first instance of monetary penalties. The experience of the Federal Trade Commission indicates that there is at least a limited scope for according a primary role to the fine within an administrative scheme. It will be recalled that the Commission has considered it desirable in some cases to strip offenders of profits which they have made in violation of the law and that it has, to this end, attempted to circumvent its inability to fine by applying corrective advertising to induce downturns in offenders' sales. The use of corrective advertising for this purpose was criticized and the suggestion was made that if disgorgement by advertisers of their ill-gotten gains is considered necessary, a better approach would be to apply some form of direct monetary penalty. The suggestion might be reiterated here. Fining might be an appropriate course in cases where the offender has already reaped substantial profits before proceedings are instituted against him or where it can be established that he was hoping for a swift and profitable one-time killing.

Fines would, when imposed in these circumstances, serve a deterrent function by reducing the potential for profit in violating the law. In cases where an offender has made substantial gains from illegal advertising practices, redistribution amongst his competitors of the sums obtained from him by way of fining might also assist in remedying the damage caused to the market by the violation--in restoring the participants in the market approximately to the positions which they occupied immediately prior to the violation. In short, fining has, in an administrative context, potential both as a deterrent and as a remedial device.

Despite the possibilities offered by resort to the fine, the sanction should, in an administrative context, be used sparingly. There is, from the point of view of deterrence, no need for its imposition in every case. The efficient deployment of resources by the regulatory agency together with the application of imaginative directives will, in the majority of cases, ensure both compliance with the legislation and the future protection of consumers from the effects of breaches which have already occurred. Nor will its application as a remedial device always be necessary, or even desirable. In some cases, for example, the profits earned by the offender in violation of the law may be too low to justify

their redistribution among other participants in the market. In others, the challenged practice may be widespread within an industry: it would be inequitable to allow an offender's competitors to gain, through redistribution of his ill-gotten profits, when they had engaged in similar conduct.

Even where it is considered necessary to resort to monetary penalties, they should be regarded as an adjunct of, not as a substitute for, the various administrative directives. Fines and orders should, in other words, normally be imposed in combination, the fine being relied on to heighten the deterrent impact of the scheme as a whole or, in some cases, to effect a redistribution of profits and the order being directed both to preventing repetition of the challenged practice and to protecting consumers from influences which linger even after the practice has been halted.

Attempting to draw these observations into rather more precise focus in terms of advertising regulation in Canada, we recommend that parallel with the criminal law sanctions we have discussed, a set of administrative sanctions be provided by way of alternative.

(1) These would include both interim and final prohibition orders. Prohibition orders, even without prior conviction, are already provided for in s.30(2) of the Combines Investigation Act and s.29.1 of the amendments thereto. However, an interim prohibition order procedure should be provided for separately from the permanent prohibition order procedure. The conditions on which an interim order is available need to be clearly spelled out in legislation, given traditional judicial reluctance to issue such orders. The conditions set out in s.29.1 appear to us to be too stringent, at least in the unfair trade practice field. They require proof that a person is likely to suffer damage from the commission of the offence for which he cannot adequately be compensated under other sections of this Act and that the damage will be substantially greater than any damage the defendant is likely to suffer through the issue of the order. This provision also, of course, applies to the anti-trust offences, and one can see in that context that a competitor who is substantially injured by a violation will have a sufficient stake to invoke the civil redress provisions of s.31.1. Additionally, to order an alleged monopoly to stop monopolizing in an interim prohibition order procedure may well put the firm out of bus-

business without the violation being fully proved, and the balance of convenience there dictates that aggrieved parties await the outcome of a full adjudication. These reasons do not hold in misleading advertising context. Often the consumer will not have a sufficient financial stake in a violation to pursue civil redress. Secondly, prohibiting a prima facie violation under an interim order in this context will rarely, if ever, have the draconian consequences that may attach to such an order with some anti-trust offences. For these reasons, we propose somewhat more permissive conditions on which an interim prohibition order should be available. These are derived from the B.C. Trade Practices Act and the Alberta Unfair Trade Practices Act and are spelled out in more detail in our final chapter.

The importance of an effective interim prohibition order procedure is highlighted by figures supplied by Departmental officials on (a) elapsed time between the initiation of the file and the laying of criminal charges under the present misleading advertising provisions of the Combines Investigation Act and (b) elapsed time between laying of charges and a determination. In the case of (a), a sampling of recent cases under s.36 involved an elapsed time of 3.85 months and under s.37, 7.97 months. In the case of (b), average elapsed time under s.37 where guilty pleas were entered was 4.75 months, where not guilty pleas were entered 10.25 months. The cumbersome, slow-moving nature of the criminal process needs no re-articulation in the light of these figures.

Provision for a further subsidiary form of interim order is called for to deal with cases where a delinquent supplier is dissipating assets to which consumers can be expected to look for satisfaction of claims or gives reasonable cause for believing that he is about to abscond the jurisdiction. Sections 13 and 13A of the B.C. Act, s.9 of the Alberta Act and s.12 of the Ontario Act all contain provisions whereby a supplier's assets can be frozen expeditiously. The Alberta provisions appear to be the most balanced and empower the Director to make an ex parte application to the court for an order prohibiting further dealings by persons holding assets of the supplier and for an order appointing a trustee or receiver to take possession and hold the supplier's assets on such terms as the court approves. These powers are important with certain fringe operators who operate on the principle of taking substantial payments from the consumer at the outset

of, or early in a contract, in return for a promise of services over some large period (e.g. travel agencies, health and dance studios). If violations are involved on the part of the supplier, it is important that the consumer have some assurance that he will have a meaningful claim against the supplier and not find that revenues have been dissipated or removed from reach.

(2) A further order that should be available to the adjudicatory body (whether court or agency) in administrative proceedings is a corrective advertising order in cases where there is a reasonable probability that the practice in question has left a residual misimpression in the market upon which consumers in the future may rely to their detriment.

(3) We propose to deal with the issue of affirmative disclosure by a prohibition on material non-disclosure in advertisements. We spell this proposal out in our list of practices in our final chapter.

(4) As to advertising substantiation, we propose again that one of the prohibited practices should be the making of claims (whether true or false) for which the advertiser had no reasonable basis at the time he made them. Enforcement authorities should have power to require either a single advertiser or class of advertisers to supply substantiating data to them to determine whether violations have occurred. We do not recommend that this material be actively publicized as under the F.T.C. ad substantiation program. The benefits are too uncertain relative to the costs involved. However, we consider that the material should be placed on the public record, subject to restrictions protecting the confidentiality of trade secrets (as recognized by the F.T.C. in its own rules on this subject).¹⁹⁶

We see no case for the provision of counter-advertising orders.

(5) Paralleling our proposals on criminal sanctions, we believe that the adjudicatory body (preferably a court in our view) on the issue of a final prohibition order should have the power to make ancillary orders requiring individual or mass restitution or compensation, rescission or contract modification, and, where compensation of victims is impracticable, a divestment (unjust enrichment) order. These propos-

als broadly square with the functional thrust of the U.S. Federal Trade Commission Improvement Act 1975 where, in addition to the F.T.C. being able to issue its own cease and desist orders, it can apply to the court for the imposition of civil monetary penalties (s.205) and bring actions in the courts for civil redress on behalf of an individual consumer or class of consumers (s.206). Given the split jurisdiction in the U.S. between the regulatory agency and the courts, these multiple proceedings may be unavoidable. In a Canadian setting, assuming the continuance of the historical trend towards placing all adjudications in this area in the hands of the courts, it is clear that considerations of efficiency alone dictate the consolidation, wherever possible, of determinations on these various objectives, within one set of proceedings.

The validity of this principle is in part recognized by s.16(3) of the B.C. Trade Practices Act which empowers the court on an application by the Director for a prohibition order also to order restitutionary relief to victims of the violation. The substituted action procedure in both the B.C. and Alberta Acts under which the Director is empowered to bring civil proceedings on behalf of aggrieved consumers reflects a further recognition of the value of merging administrative and private law enforcement initiatives.

It remains to add that these various ancillary orders should only be available following the issuance of a final prohibition order and not on an interim prohibition where there may not have been a full hearing on the merits.

(6) Power to issue trade rules with legislative force should be contained in any ideal regulatory scheme. These trade rules would spell out the applications of legislative prohibitions to particular industries (e.g. carpet, used cars) or particular practices (e.g. manufacturers' list price, or gas mileage claims). If no special administrative agency is created to administer the legislation, either a procedure similar to that provided for in s.19 of the Federal Consumer Packaging and Labelling Act¹⁹⁷ or the institutionalised consultative process envisaged in the U.K. Fair Trading Act should be adopted, so that draft rules are proposed and affected parties are given a period of time to react to them before they are finalized and promulgated. It is important, though, in our view that ultimate responsibility

for the rules adopted should rest with the political process (as at present) and not be completely delegated away to some subordinate authority.

Rule-making in the role of defining more precisely the application of existing prohibitions should be distinguished from a regulation-making power which enables the addition of new prohibitions. The vetting procedure described above would seem appropriate also in the latter case, but as we indicate in our final chapter, we have some reservations about providing for the creation of new criminal offences by regulation (notwithstanding ample precedent for this), particularly when the administrative and civil sanctions we are proposing enable us to reduce our dependence on the criminal law without reducing the effectiveness of the regulatory scheme.

With the first type of regulation (i.e. binding interpretive regulations), it may be appropriate that they be promulgated by the appropriate Minister. With the second type (i.e. new prohibitions) we believe that it would be appropriate that a Cabinet Order-in-Council be required.

We have already indicated that we do not favour a general preclearance program for all advertising, although we see a role for informal advisory opinions and generalized informal guidelines making systematic these opinions.

(7) Any ideal regulatory scheme in the trade practice area should provide for a consent order procedure similar to that employed by the F.T.C. or an assurance of voluntary compliance procedure similar to that contained in the B.C. (s.15) Alberta (s.10) and Ontario (s.9) trade practice legislation. The Director should be empowered to enter into agreements with a supplier to cease and desist from engaging in the offending practice in future and also obtain undertakings to publish corrections and/or provide compensatory, restitutionary or other appropriate civil relief to consumers already prejudiced by the practice. This is in line with the assurance of voluntary compliance provisions in s.15 of the B.C. Act and s.10 of the Alberta Act. Compliance by a supplier with an assurance of voluntary compliance should be a defence in subsequent criminal or administrative proceedings. Such a procedure economizes on enforcement resources by avoiding needless, subsequent, formal enforcement measures. Assurances of voluntary compliance should be placed on the

public record (as is the case now with F.T.C. practice and under the provincial trade practice legislation), in part so that enforcement authorities can avoid imputations of "secret deals" that may or may not be consistent with the public interest i.e. justice is not only done but seen to be done.

III. Footnotes

- 1 These three factors - the reasonable likelihood of deception or unfairness, the "in commerce" nature of the practice (which must also be "interstate") and the public interest in proceeding are the three principal factors affecting the Commission's jurisdiction. None of them has imposed serious restrictions on the Commission's range of activities. With regard to the "interstate commerce" factor, it was held in FTC v. Bunte Bros. 312 U.S. 349 (1941) that the Act does not give the Commission authority over intrastate activities which merely "affect" interstate commerce. However, the Commission has frequently asserted its jurisdiction over intrastate acts that are part of a broader program of interstate activity. With regard to the "public interest" requirement, courts reviewing agency determinations these days generally defer to the agency's judgment as to what is in the public interest. The courts show a similar tendency to defer to Commission judgment as to the likelihood of deception or unfairness in each case: see Harvard Note, 1022-6. For a general survey of the F.T.C.'s role in advertising regulation, see Thain, "Advertising Regulation: The Contemporary F.T.C. Approach", 1 Fordham Urban Law Journal 349 (1973).
- 2 See Voluntary Compliance Rule 16 C.F.R. x 2.21 (1974).
- 3 Consent Order Procedure, 16 C.F.R. ss.2.31 - 2.35 (1974).
- 4 Rules of Practice for Adjudicatory Proceedings 16 C.F.R. ss.3.1 et seq (1974), esp. ss3.51 - 3.54.
- 5 15 U.S.C. s.45(c) (1970). For an up-to-date discussion of Commission procedure, see Rothschild and Carroll, Consumer Protection Reporting Service (1974), 78-90. It is interesting to note that a similar three-tiered administrative approach to the resolution of advertising complaints has recently been adopted in the United Kingdom: see Fair Trading Act 1973 (U.K.), ss 34 (assurance of voluntary compliance); 35-7 (prohibition order); 37(3) (consent order procedure). Provision is made for a somewhat similar

procedure in Ontario's Business Practices Act R.S.O. 1974, c.131: s.6 provides for the issuing of cease and desist orders, s.9 for assurances of voluntary compliance.

- 6 340 U.S. 474, 491 (1951).
- 7 327 U.S. 608, 611 (1946).
- 8 Coro, Inc. v. FTC 338 F.2d 149, 153 (1st Cir. 1964)
cert. denied 380 U.S. 954 (1965).
- 9 Note, "'Corrective Advertising' Orders of the Federal Trade Commission" (1971) 85 Harvard Law Review 477, 492-4.
- 10 See Federal Trade Commission Act, 15 U.S.C. s.45(b) (1970), as amended by Trans-Alaska Pipeline Authorization Act 87 Stat. 591, s.408 (1973).
- 11 265 F.2d 246 (10th Cir. 1959).
- 12 E.g., L. Heller & Son, Inc. v. FTC 191 F.2d 954 (7th Cir. 1951).
- 13 Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking 16 C.F.R. s.408 (1964).
- 14 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,671 at 21,720 (FTC 1971) (proposed complaint); [1970-73 Transfer Binder] Trade Reg. Rep. s.20,039 at 20,024 (FTC 1972) (consent order provisionally accepted).
- 15 3 Trade Reg. Rep. s.20,346 at 20,213 (FTC 1973).
- 16 The Commission's ruling was upheld in J. B. Williams Co. v. FTC 381 F.2d 884 (6th Cir. 1967).
- 17 182 F.2d 36 (D.C. Cir. 1950) cert. denied 340 U.S. 818 (1950).
- 18 381 F.2d 884 (6th Cir. 1967).
- 19 275 F.2d 18 (5th Cir. 1950).

- 20 ITT Continental Baking Co., Inc. (Profile bread) [1970-73 Transfer Binder] Trade Reg. Rep. s.19,681 at 21,727 (consent order).
- 21 E.g., American Home Products Corp. et al., Sterling Drug Co. et al. and Bristol-Myers Co. et al. [1970-73 Transfer Binder] Trade Reg. Rep. S.19,962 at 21,983 (FTC 1972) (proposed complaint).
- 22 E.g., Ocean Spray Cranberries, Inc. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,981 at 21,993 (FTC 1972). The order in this case gave the respondent the option of devoting 25% of his advertising by aggregate expenditure or 25% by time and space to the disclosure.
- 23 E.g., Chemway Corp. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,400 at 21,520 (FTC 1970) (proposed complaint). The corrective advertising portion of the order was dropped in negotiations leading to final consent: [1970-73 Transfer Binder] Trade Reg. Rep. s.19,607 at 21,648 (FTC 1971).
- 24 E.g., Warner-Lambert Co. 3 Trade Reg. Rep. s.20,776 at 20,635 (FTC 1974) (initial order to cease and desist).
- 25 E.g., Ocean Spray Cranberries, Inc. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,981 st 21,993 (FTC 1972).
- 26 E.g., Warner-Lambert Co. 3 Trade REg. Rep. s.20,776 at 20,635 (FTC 1974).
- 27 3 Trade Reg. Rep. s.20,334 at 20,202 (FTC 1973) (consent order accepted).
- 28 American Home Products Corp. et al.; Sterling Drug Co. et al.; and Bristol-Myers Co. et al. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,962 at 21,983 (FTC 1972) (proposed complaint); [1970-73 Transfer Binder] Trade Reg. Rep. s.20,263 at 22,292 (FTC 1973) (complaint issued).
- 29 E.g., ITT Continental Baking Co., Inc. (Profile bread) [1970-73 Transfer Binder] Trade Reg. Rep. s.19,681 at 21,727 (FTC 1971).

- 30 3 Trade Reg. Rep. s.20,776 at 20,635 (FTC 1974).
- 31 Reproduced in Campbell and Phears, "Federal Trade Commission: Developments in Advertising Regulation and Antitrust Policies" (1973) 41 George Washington Law Review 880, 902, n.149.
- 32 Ibid. 902.
- 33 See Note, "'Corrective Advertising' Orders of the Federal Trade Commission", op.cit. Note 9, 505-6. The fear has probably been dispelled by the Profile bread experience. Subsequent to the corrective campaign, the general advertising manager for Continental Baking Products disclosed a substantial decline in sales of Profile bread since issuance of the order (see Borowsky, "The Federal Trade Commission and the Corrective Advertising Order" (1972) 6 University of San Francisco Law Review 367, 374-5, n.43).
- 34 E.g., Sugar Information, Inc. [1970-73 Transfer Binder] Trade Reg. Rep. s.20,142 at 22,131 (FTC 1972) (consent order accepted). The proposed order contained a draft of the message which included positive product assertions ([1970-73 Transfer Binder] Trade Reg. Rep. S.20,085 at 22,054 (FTC 1972)). These were later excised by the Commission prior to final consent being given. The complaint as originally issued in Warner-Lambert Co. included the stipulation: "[n]o such advertisement shall contain any statement or representation that contradicts, negates or detracts from said disclosures" ([1970-73 Transfer Binder] Trade Reg. Rep. s.20,045 at 22,026 (FTC 1972)). No mention of this provision is made in the report of the initial order to cease and desist (3 Trade Reg. Rep. s.20,776 at 20,635 (FTC 1974)).
- 35 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,673 at 21,721 (FTC 1971) (proposed complaint); [1970-73 Transfer Binder] Trade Reg. Rep. s.20,129 at 22,120 (FTC 1972) (consent order finally accepted).
- 36 E.g., Chemway Corp. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,400 at 21,520 (FTC 1970) (proposed complaint). The corrective advertising requirement

was dropped in the consent order ([1970-73 Transfer Binder] Trade Reg. Rep. s.19,607 at 21,648 (FTC 1971)); Standard Oil of California [1970-73 Transfer Binder] Trade Reg. Rep. s.19,352 at 21,484 (FTC 1970) (proposed complaint). In the final order to cease and desist, the Commission found that the circumstances did not warrant the imposition of corrective advertising (3 Trade Reg. Rep. s.20,789 at 20,646 (FTC 1974)).

- 37 Campbell and Phears, op.cit. Note 31, 900-1.
- 38 Ibid. 899.
- 39 Thain, "Corrective Advertising: Theory and Cases" (1973) 19 New York Law Forum 1, 18.
- 40 [1970-73 Transfer Binder] Trade Reg. Rep. s.20,112 at 22,069 (FTC 1973) (final order to cease and desist); affirmed Firestone Tire & Rubber Co. v. FTC 481 F.2d 246 (6th Cir. 1973).
- 41 3 Trade Reg. Rep. s.20,470 at 20,391 (FTC 1972) (final order to dismiss).
- 42 3 Trade Reg. Rep. s.20,464 at 20,372 (FTC 1973) (final order to cease and desist). The fourth case was Standard Oil of California and Batten, Barton, Durstine & Osborne 3 Trade Reg. Rep. s.20,789 at 20,646 (FTC 1974). Again, the full Commission held that the evidence failed to disclose the need for corrective advertising.
- 43 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,773 at 21,814 (FTC 1971). (Hearing examiners were subsequently renamed administrative law judges.)
- 44 3 Trade Reg. Rep. s.20,658 at 20,540 (FTC 1974) (initial order to cease and desist).
- 45 See Thain, op.cit., Note 39, 18.
- 46 Swift & Co. [1970-73 Transfer Binder] Trade Reg. Rep. s.19,476 at 21,555 (FTC 1971) provides an illustration. Here, the Commission decided not to order corrective advertising in view of the respondent's weak position

in the market. This factor was relevant not only in view of the possible consequences of imposing the order but also because its small market share indicated that its advertising could have only a low residual impact.

- 47 E.g., Lemke, "Souped Up Affirmative Disclosure Orders of the Federal Trade Commission" (1970) 4 University of Michigan Journal of Law Reform 180; Rosden and Rosden, The Law of Advertising, I, (1973) 9-24 ff. Cf. Campbell and Phears, op.cit. Note 31, 906-8; Note, "'Corrective Advertising' Orders of the Federal Trade Commission", op.cit., Note 9, 491 ff.
- 48 See Firestone Tire & Rubber Co. [1970-73 Transfer Binder] Trade Reg. Rep. s.20,112 at 22,069 (FTC 1972); Campbell and Phears, op.cit., Note 31, 906.
- 49 Rothschild and Carroll, op.cit., Note 5, 99-100; Acheson and Tauber, "The Limits of FTC Power to Issue Consumer Protection Orders" (1972) 40 George Washington Law Review 496, 521-2.
- 50 See note 53 infra.
- 51 Unfair Trade Practices Act (Bill 21, Alta, 1975), s.16; Trade Practices Act Stat. B.C. c.96, s.16.
- 52 Law Reform Commission of Canada, op.cit., Note 9, 145-6.
- 53 See the statement of Ch Kirkpatrick in Firestone Tire & Rubber Co. [1970-73 Transfer Binder] Trade Regulation Reporter, s.20,112 at 22,087 (FTC 1972)
- 54 Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation (1971), reproduced in 2 Trade Reg. Rep. s.7,573 at 12,181. Statutory authority for the program is found in s.6 of the Federal Trade Commission Act (15 U.S.C. s.46 (1970) which empowers the Commission to gather information concerning the conduct of any person engaged in commerce and to require any such person to file with the Commission special reports furnishing such information as is required. S.6(f)

empowers the Commission to make the information public. See Rothschild and Carroll, op.cit., Note 5, 96. There have, as yet, been no challenges to the Commission's authority to issue such orders: see Campbell and Phears, op.cit., Note 31, 888.

- 55 2 Trade Reg. Rep. s.7,573 at 12,181. The resolution provides that the Commission will, upon application by a manufacturer, conduct a hearing on the issue as to whether the material submitted includes trade secrets, customer lists or other financial information which may be privileged or confidential, publication of which ought to be withheld.
- 56 Note, "The FTC Ad Substantiation Program" (1973) 61 Georgetown Law Journal 1427, 1435; Consumer Subcommittee of the Committee on Commerce, Staff Report to the Federal Trade Commission on the Ad Substantiation Program (1972) 4, (hereinafter referred to as the Ad Substantiation Report).
- 57 Ibid., 1-2, 4.
- 58 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,678 at 21,743 (FTC 1971).
- 59 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,771 at 21,812 (FTC 1971).
- 60 Ibid.
- 61 [1970-73 Transfer Binder] Trade Reg. Rep. s.19,827 at 21,838 (FTC 1971).
- 62 The usual form of the order to file a special report is as follows: "Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended August 4, 1971, entitled 'Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation', a copy of which is enclosed, your Corporation is ordered to file a Special Report within sixty (60) days from the date of this Order containing the information specified herein.

Your report is required to be subscribed and sworn to by an official of the Corporation who has prepared or supervised the preparation of the report from books, records, correspondence and other data and material in your possession. The subscriber is to give his full name and state his official capacity.

The following is a chart listing claims made in recent advertisements for [products] manufactured by your Corporation. Column (1) of the chart indicates the name of the advertised model, the media in which the advertisement appeared, and the date and time or page of the advertisement. Column (2) restates the claim made in the advertisement. Column (3) specifies the information required by this Order regarding each claim.

Your report should restate each item of Column (3) of the chart with which the corresponding answer is identified. If you possess only part of the information demanded in any question, give such information as is available to you and explain why your answer is incomplete. If the full information is known to you to be obtainable from another source, identify the source. If you do not possess the information demanded in any question, and the information is not known to you to be obtainable from another source, state these facts in your report.

You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file Special Reports or for the filing of false reports.

The Special Report required by this Order is to be filed within sixty (60) calendar days from the date of this Order." (2 Trade Reg. Rep. s.7,573 at 12,181-2).

63 [1970-73 Transfer Binder] Trade Reg. Rep. s.20,059 at 22,040 (FTC 1972).

64 [1970-73 Transfer Binder] Trade Reg. Rep. s.20,148 at 22,133 (FTC 1972).

- 65 3 Trade Reg. Rep. s.20,460 at 20,369 (FTC 1973).
- 66 3 Trade Reg. Rep. s.20,461 at 20,370 (FTC 1973).
- 67 Ad Substantiation Report, op.cit., Note 56, 4-5.
- 68 Ibid., 5.
- 69 Ibid., 15.
- 70 Ibid., 16.
- 71 Ibid., 17.
- 72 [1970-73 Transfer Binder] Trade Reg. Rep. s.20,120 at 22,102 (FTC 1972) (proposed complaints).
- 73 Fedders Corp. 3 Trade Reg. Rep. s.20,825 at 20,691 (FTC 1975) (final order to cease and desist); City Investing Co. et al. (Rheem) 3 Trade Reg. Rep. s.20,451 at 20,352 (FTC 1973) (consent order accepted); Whirlpool Corp. et al. 3 Trade Reg. Rep. s.20,570 at 20,483 (FTC 1974) (consent order accepted); General Motors Corp. et al. 3 Trade Reg. Rep. s.20,747 at 20,600 (FTC 1974) (consent order accepted); Volvo of America Corp. 3 Trade Reg. Rep. s.20,390 at 20,271 (FTC 1973) (consent order accepted).
- 74 Sonotome Corp.; Seeburg Industries, Inc.; Textron, Inc.; Radioear Corp.; Dahlberg Electronics, Inc.; Beltone Electronics Corp. et al. 3 Trade Reg. Rep. s.20,588 at 20,494.
- 75 3 Trade Reg. Rep. s.20,661 at 20,542.
- 76 Ad Substantiation Report, op.cit., Note 56, 2, 11.
- 77 Campbell and Phears, op.cit., Note 31, 890.
- 78 Ad Substantiation Report, op.cit., Note 56, 2.
- 79 FTC Release, December 14, 1972 (2 Trade Reg. Rep. s.7,573 at 12,181-2).
- 80 The first orders to focus on major themes were those issued against eight manufacturers of anti-perspirants

and deodorants in May 1973 (The Gillette Co. et al.
3 Trade Reg. Rep. s.20,340 at 20,205). Typically in
issue were such claims as "A light, clean Scent. Not
perfumey or chemical. A scent that comes from real,
natural ingredients. Not a lot of artificial ones";
"And it's Right Guard. You know it has the best
wetness fighter in any anti-perspirant spray"
(Gillette: Right Guard); "Arrid Extra Dry has the
one spray ingredient that helps stop wetness best"
(Carter-Wallace, Inc.: Arrid Extra Dry).

- 81 Campbell and Phears, op.cit., Note 31, 892-3.
- 82 Rosden and Rosden, op.cit., Note 47, 35-06, 35-14.
- 83 Trans-Alaskan Pipeline Authorization Act 87 Stat. 591,
s.408 (1973).
- 84 FTC Release, January 22, 1974 reproduced in 2 Trade
Reg. Rep. s.7,573 at 12,181.
- 85 Ad Substantiation Report, op.cit., Note 56, 2, 4.
- 86 R.S.C. 1970, c.B-11 (as amended).
- 87 47 U.S.C. ss 151 et seq. (1970).
- 88 Canada: Special Committee on the Media (Osgoode Hall
Law School), Submission to the Canadian Radio-Tele-
vision Commission on Response to Commercials (1970);
Canadian Radio-Television Commission, Public Hearing,
Proposed Radio (TV) Broadcasting Regulations (1970)
C-14, Vol. II, 1009 et seq.; United States: Federal
Trade Commission, Press Release: Commission Supports
Counter-Advertising for Certain Types of Product
Commercial 6 January 1972.
- 89 Federal Communications Commission, Fairness Doctrine
and Public Interest Standards: Fairness Report
Regarding Handling of Public Issues 39 Fed. Reg.
26372 (1974) (hereinafter referred to as 'Report
(1974)').
- 90 47 U.S.C. s.307(a) (1970).
- 91 Federal Communications Commission, Report on

Editorializing by Broadcast Licensees 13 F.C.C. 1246 (1949).

92 Ibid., 1249.

93 Report (1974), op.cit., Note 86, 26375-6.

94 Cullman Broadcasting Co. 40 F.C.C. 576 (1963).

95 395 U.S. 367 (1969).

96 Petition of Sam Morris 11 F.C.C. 197 (1946).

97 In Re Complaint Directed to Station WCBS-TV 8 F.C.C. 2d 381 (1967); reconsidered 9 F.C.C. 2d 921 (1967).

98 Banzhaf v. Federal Communications Commission 405 F.2d 1082 (D.C. Cir. 1968).

99 See Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access" (1972) 85 Harvard Law Review 768, 775.

100 Friends of the Earth and Gary A. Soucie Pike & Fischer, Radio Regulations 2d 994 (1970).

101 Ibid., 1000.

102 Friends of the Earth and Gary A. Soucie v. Federal Communications Commission 449 F.2d 1164, 1169 (D.C. Cir. 1971).

103 Ibid.

104 Complaint of Alan F. Neckritz (Chevron) 29 F.C.C. 2d 807 (1971).

105 30 F.C.C. 2d 643 (1971); reconsidered 31 F.C.C. 2d 729 (1971).

106 Federal Communications Commission, In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act 30 F.C.C. 2d 26 (1971).

107 See Statement of the Federal Trade Commission

submitted to the Federal Communications Commission in Docket No. 19,260 relating to the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act.

108 See Federal Trade Commission, Press Release: Commission Supports Counter-Advertising for Certain Types of Product Commercials 6 January 1972.

109 405 F.2d 1082, 1099 (D.C. Cir. 1968).

110 93 S.Ct 2080 (1973).

111 It is not easy to draw any concrete propositions from the case. The principal ground relied on by the majority was that the first amendment only extends protection to individuals against government interference with their rights of free speech; since broadcast licensees are essentially private entities, their actions - even if they do restrict the rights of others - cannot be declared unconstitutional (see 93 S.Ct 2080, 2093-5 per Burger C. J., with whom Stewart and Rehnquist JJ. concurred).

Burger C. J. went on to hold that even if there had been state action in this case, the broadcasters' policies did not abridge any first amendment right of the respondents. In so doing, he emphasized the broad journalistic discretion vested in broadcast licensees. Blackmun and Powell JJ. concurred in the "state action" portion of the judgment and held that it was therefore unnecessary to pass an opinion on the substantive first amendment questions (at 2109); White J. concurred with the Chief Justice's reasoning on the substantive first amendment questions, but dissented on the state action question (at 2108); Douglas J. concurred with the result reached by the Chief Justice, but for different reasons. He held that the freedom of the press enjoyed by broadcast licensees is absolute and cannot be restricted by the recognition of any other rights or interests (at 2112); Brennan and Marshall JJ. dissented (at 2120).

112 Report (1974), op.cit., Note 86, 26375-7, 26,383.

- 113 Ibid., 26381-2.
- 114 Ibid., 26382.
- 115 Ibid., See also Putz, "Fairness and Commercial Advertising: A Review and Proposal" (1972) 6 University of San Francisco Law Review 215, 246.
- 116 Report (1974), op.cit., Note 86, 26382.
- 117 See generally, Ellman, "And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising" (1972) 60 California Law Review 1416, 1426 et seq.
- 118 See Loevinger, "The Politics of Advertising" (1973) 15 William and Mary Law Review, 1, 4-5, 16.
- 119 See Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill Law Journal 263, 283-4.
- 120 Loevinger, op.cit., Note 118, 15.
- 121 Ibid., 13; Trebilcock, op.cit., Note 119, 283-4.
- 122 See Note, "FTC Substantive Rulemaking Authority" [1974] Duke Law Journal 297, 299, n.7.
- 123 Ibid., 319.
- 124 Comment, "Substantive Rule-Making Authority in the Federal Trade Commission" (1974) 59 Iowa Law Review 629, 632.
- 125 De Smith, Judicial Review of Administrative Action (3rd ed., 1973), 274-7.
- 126 Ibid., 631-2; Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy" (1965) 78 Harvard Law Review 921, 963-4; Wegman, "Cigarettes and Health: A Legal Analysis" (1966) 51 Cornell Law Quarterly 678, 741.
- 127 Note, "FTC Substantive Rulemaking Authority", op.cit., Note 122, 299.

- 128 See Shapiro, op.cit., Note 126, 924; Note, "FTC Substantive Rule-Making Authority: An Evaluation of Past Practice and Proposed Legislation" (1973) 48 New York University Law Review 135, 153; see also Lowi, The End of Liberalism (1969), 144: "The same citizen might receive the same injunction under a specific legislative provision (a case-oriented approach) as under an abstract provision, but his problems involved in relation to the injunction would not be the same. The command under the former is issued to him for an act he committed against a law dealing with that act. Under the latter approach, he received the command not because of who he is or what he does, but because abstractly he belongs to a type, or his behaviour is of a type, that comes within public policy."
- 129 Rothschild and Carroll, op.cit., Note 5, 107; Rosden and Rosden, op.cit., Note 47, 32-7 et seq.; Comment, "Substantive Rule-Making in the Federal Trade Commission", op.cit., Note 124.
- 130 16 C.F.R. s.1.1. (1974).
- 131 Ibid.
- 132 Ibid., s.1.2.
- 133 Ibid.
- 134 Rosden and Rosden, op.cit., Note 47, 32-37.
- 135 16 C.F.R. s.1.5. (1974).
- 136 See Federal Trade Commission, Annual Report (1971), 7, quoted in Rosden and Rosden, op.cit., Note 47, 32-39; Weston, "Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor" (1964) 24 Federal Bar Journal 548, 567.
- 137 Ibid.
- 138 16 C.F.R. s.233 (1974).
- 139 Ibid., s.237.

- 140 Ibid., s.238.
- 141 E.g., Guides for the Dog and Cat Food Industry 16 C.F.R. s.241 (1974); Guide Against Deceptive Use of the Word "Free" in Connection with the Sale of Photographic Film and Film Processing Service 16 C.F.R. s.242 (1974).
- 142 Weston, op.cit., Note 136, loc.cit..
- 143 Wool Products Labelling Act of 1939 15 U.S.C. s.68 (1970).
- 144 Fur Products Labelling Act 15 U.S.C. s.69 (1970).
- 145 Textile Fiber Products Identification Act 15 U.S.C. s.70 (1970).
- 146 Flammable Fabrics Act 15 U.S.C. ss 1191-1204 (1970).
- 147 General Procedures 16 C.F.R. ss 1.11 et seq. (1974).
- 148 Ibid., s.1.13.
- 149 Ibid.
- 150 Comment, "Substantive Rulemaking in the Federal Trade Commission", op.cit., Note 124, 631.
- 151 Federal Trade Commission, Statement of Basis and Purpose of Trade Regulation Rule 29 Fed. Reg. 8325, 8371.
- 152 16 C.F.R. s.1.15 (1974).
- 153 Ibid., s.1.16.
- 154 Ibid.
- 155 Ibid.
- 156 Ibid. On rule-making procedure in general, see Note, "FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation", op.cit., Note 128, 147-51.

- 157 16 C.F.R. s.400 (1974).
- 158 Ibid., s.403.
- 159 Ibid., s.401.
- 160 Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking 29 Fed. Reg. 8325 (1964).
- 161 Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps 16 C.F.R. s.422 (1974).
- 162 Retail Food Store Advertising and Marketing Practices 16 C.F.R. s.424 (1974).
- 163 5 Trade Reg. Rep. s.50,219 at 55,396 (FTC 1974).
- 164 Ibid., s.50,220 at 50,219 (FTC 1974).
- 165 Ibid., at 55,396-7.
- 166 482 F.2d 672 (D.C. Cir. 1973), cert. denied 94 S.Ct 1475 (1974).
- 167 Ibid., 678.
- 168 The principal arguments were, first, that s.6(g), read in the light of s.6 as a whole, is clearly confined to the issuing of procedural and "internal housekeeping" rules; secondly, that s.6(g) was passed at a time when it was envisaged that the Commission would perform only investigatory functions and that, therefore, historical considerations militated against reading the provision as conferring broad powers of enforcement; thirdly, that Congress had in the past expressly conferred substantive rule-making power on the Commission in four specific areas: (wool products labelling, fur products labelling, textile fiber products identification and flammable fabrics) - these grants of power would have been redundant if s.6(g) conferred the power generally; and, finally, that the Commission had itself, for the first 50 years of its existence, denied that it had power to issue binding rules.

- 169 482 F.2d 672, 686 (D.C. Cir. 1973).
- 170 Ibid., 675.
- 171 Ibid., 677.
- 172 Ibid., 693. For critical analyses of the decision, see Rothschild and Carroll, op.cit., Note 5, 107-9; Rosden and Rosden, op.cit., Note 47, 32-7 - 32-17; Comment, "Substantive Rule-Making in the Federal Trade Commission", op.cit., Note 124; Note, "FTC Substantive Rulemaking Authority", op.cit., Note 122; Guttman, "The FTC's Newly Recognized Power to Issue Substantive Intra-Agency Rules" (1974) 5 Loyola University of Chicago Law Journal 107.
- 173 Rothschild and Carroll, op.cit., Note 5, 109.
- 174 Fair Trading Act 1973.
- 175 Note, however, that the Act does make provision for the issuing of prohibition orders through adjudication: ss 34 ff.
- 176 Note, "FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation", op.cit., Note 128, 151.
- 177 Business Practices Act R.S.O. 1974, c.131.
- 178 Wegman, op.cit., Note 126, 749.
- 179 Rothschild and Carroll, op.cit., Note 5, 108(A); Lowi, op.cit., Note 128, 230.
- 180 Shapiro, op.cit., Note 126, 935-6.
- 181 Bernstein, Regulating Business by Independent Commission (1955) 179-80.
- 182 See Kariel, The Decline of American Pluralism (1961) 260-5.
- 183 Shapiro, op.cit., Note 126, 937-40.
- 184 Ibid., Rothschild and Carroll, op.cit., Note 5, 114.

- 185 Ibid., 114A; Rosden and Rosden, op.cit., Note 47, 32-7.
- 186 Shapiro, op.cit., Note 126, 930.
- 187 Rosden and Rosden, op.cit., Note 47; Lowi, op.cit., Note 128, 230.
- 188 Note, "FTC Substantive Rulemaking Authority", op.cit., Note 122, 320; Burrus and Teter, "Anti-Trust: Rulemaking V. Adjudication in the FTC" (1966) 54 Georgetown Law Journal 1106.
- 189 See Howard and Hulbert, Advertising and the Public Interest, (Staff Report to the Federal Trade Commission, 1973) 77-8.
- 190 R.S.C. 1970, c.B-11, s.16(1)(ii) (which empowers the Commission to make regulations applicable to broadcast licensees "respecting the character of advertising and the amount of time that may be devoted to advertising").
- 191 See Radio (A.M.) Broadcasting Regulations SOR/64-49 (1964) (as amended), s.10; Radio (F.M.) Broadcasting Regulations SOR/64-249 (1964) (as amended), s.10; Television Broadcasting Regulations SOR/64-50 (1964) (as amended) s.10.
- 192 See Radio (A.M.) Broadcasting Regulations SOR/64-49 (1964) (as amended), s.11; Radio (F.M.) Broadcasting Regulations SOR/64-249 (1964) (as amended), s.11; Television Broadcasting Regulations SOR/64-50 (1964) (as amended), s.11. For discussion of preclearance generally in Canada, see Alyluia, "The Regulation of Commercial Advertising in Canada" (1972) 5 Manitoba Law Journal 97, 155-66; Grant, Broadcasting and Cable Television Regulatory Handbook (1973), passim.
- 193 E.g., CRTC, Announcement on Beer, Wine and Cider Advertising, July 19, 1971.
- 194 See Grant, op.cit., Note 192, 164-5.
- 195 See Canadian Association of Broadcasters, Broadcast Code for Advertising to Children (1973), reproduced

in Grant, op.cit., Note 192, 333.

196 See 2 Trade Reg. Rep. at para. 1281.

197 S.C.c. 41, 1970-71.

IV. PRIVATE LAW REDRESS FOR UNFAIR TRADE PRACTICES

Introduction

In discussions of misleading advertising and its control, the typical approach has been to explore the statutory control of advertising misuse and related problems. With rare exceptions,¹ these discussions have tended to assume that private redress at common law is inadequate and that legislative provisions are generally the most effective means of control.² The purpose of this chapter is to examine those assumptions critically to determine if, in fact, the common law is inadequate, and, if it is so, to discover how far, if at all, legislative enactments have progressed in remedying these inadequacies.

It may be useful to re-state the context for this analysis. Advertising, it must be noted, is not a recent phenomenon. It is merely one of the corollaries to the development of technology and the market economy reflecting the present status of the consumer in the economy. However, the qualitative and quantitative increase in the importance of advertising now demands a correspondingly greater availability of legal redress for its misuse.

Historically, contract is the natural body of law to search for the means of control over this misuse. The question one poses in this regard is whether twentieth century advertising has outstripped the ability of the law of contract to cope, or whether a new regulatory approach is demanded by the circumstances.

The history and development of contract law from the heyday of Adam Smith and laissez-faire to its present state provides a useful reflection of the evolution of western society and the response of the judiciary to social and political changes. Contract, as all first year law students learn, is a body of law founded upon laissez-faire principles and the economic philosophy of the free market. However, just as government has stepped in to assume control over some of the inevitable excesses of the free market, the courts have attempted to mitigate some of the more unjust but logical consequences of contract principles by limiting the reach of established doctrines.

While, in principle, the law of contract seems an

overly formalistic mechanism to confront the complex problems of the modern market place, in practice the courts have interceded to keep contract in line with changing social policies and public expectations. While this has inevitably led to contradictions within the law, it has also resulted in a set of principles in many respects sufficiently flexible to meet the needs of developing social and economic pressures, although this does not necessarily imply that the common law should be the sole means of regulating the civil law consequences of market imbalances. The relative advantages of the two means of regulation of civil law rights--common law or statute--will be examined in the following discussion. Our analysis of the common law will serve to underscore the point that the principal role of statutory intervention should not be to effect a radical transformation of consumers' present civil rights but rather to achieve a consolidation and codification of the more responsive of the existing judicial initiatives.

The present chapter will deal with the response of the common law and recent legislative enactments to the problems of private redress faced by the consumer in the modern marketplace. The discussions of the common law are focused on the ability of the substantive law of contract and tort to afford a remedy to the individual faced with deceptive or unconscionable practices. The statutory context is provided by an analysis of the provincial legislation recently enacted in Canada, -- the British Columbia Trade Practices Act,³ the Alberta Unfair Trade Practices Act⁴ and the Ontario Business Practices Act,⁵ -- using where applicable, Canadian Federal legislation, Australian, British and American developments by way of comparison.

Characterization Of Advertising Claims

For the most part, misleading advertising will fall within what has come to be known by statute as deceptive practices -- i.e. those calculated to mislead the consumer by deceiving him as to the nature or quality of what he is receiving. However, where the practice complained of goes beyond mere deception or, as in some cases, is manifestly unfair without falling into the traditional legal categories that regulate deception, there is a residual legal tool framed in equity that may be brought to bear and in cases of unconscionability, relief may be granted simply on the basis of gross injustice. At common law the distinction

between deceptive and unconscionable practices is found principally in the legal categories of misrepresentation, mistake and the equitable doctrine of unconscionability. The provincial legislatures have tended to retain the distinction in their consumer protection legislation and it is a useful distinction to bear in mind in the following discussion.

The Common Law Position

(i) *Mere puffs*. Doctrinally, the position of the common law is fairly clear in respect to the characterization of advertising or sales claims (albeit somewhat contrived). False claims made in order to induce consumers to contract will fall into one or more of several legal categories. In each case the proper characterization of the claim is a matter of construction and herein lies the consumer's first problem. Traditionally, the courts have viewed advertising material conservatively and have often construed advertisements merely as invitations to treat⁶ or "mere puffs" and therefore of no legal consequence i.e. simplex commendatio non obligat.⁷ Unfortunately, legal texts have enshrined this philosophy of the law in statements such as the following taken from Cheshire and Fifoot:

Eulogistic commendation of the res vendita is the age-old device of the successful salesman, and it would be an impracticable and mischievous rule which permitted the rescission of contracts merely because expressions of a laudatory and optimistic nature, couched in the language of exaggeration, chanced to transcend the truth.⁸

It should be noted that the legal authorities supporting this position are now very old; the decisions date from days when contract formation, the marketplace and the advertising industry were totally unlike their present counterparts. The conclusion of one author, in response to this issue, is to argue that the problems inherent in modern advertising may have the effect of rendering irrelevant established contract principles in the modern consumer transaction.⁹ A more positive view of the potential response of contract doctrines posits that once a claim has been made by an advertiser, the court should assume it to have been made for the purpose and with the intent of the

consumer acting upon the claim,¹⁰ thus moving such claims beyond mere puffs and into the area of misrepresentation and terms. This view is not mere optimism in the abstract as there are indications that Canadian courts are moving in this direction. In Babcock v. Servacar Ltd.,¹¹ the court held that a negligently prepared diagnostic report on a car the plaintiff was proposing to buy supported an action for negligent misrepresentation under Hedley Byrne v. Heller,¹² and was clearly disposed to regard the garage's advertising claims as giving rise to a contractual warranty. In Quebec Oats Co. of Canada v. Kitzul,¹³ involving the question of whether a contract for the sale and purchase of poultry food contained as an implied warranty of quality, Disberry J. said:

The principle of law enunciated by Buller J. in 1789 A.D. [that an affirmation at the time of a sale is a warranty, provided it was so intended] is a salutary one, and particularly necessary in these modern days when by radio, T.V., and other advertising mediums, vendors seek to sell pills and pellets for every purpose ranging from virility pellets to tranquillizer pills; pellets to fatten the slim or to slim the corpulent; pills to induce pregnancy or pills they hope will prevent it; pills to cure all aches and pains, and even pellets to drop in the gas tank to pep up the family car. Buller J. lived in simpler days but the legal principle he so clearly stated remains an effective weapon to be employed against those who resort to excessive or extravagant claims to induce Her Majesty's subjects to buy their pills and pellets. One recalls the well-known case of Carlill v. Carbolic Smoke Ball Co. where the unfortunate lady after smoking herself daily for 58 days with the defendant's smoke ball nevertheless contracted influenza.¹⁴

Ranger v. Herbert Watts (Quebec) Ltd. and Peter Jackson Ltd.,¹⁵ highlights the same trend. In that case Haines J. said: "By newspaper, radio and television every home has become the display window of the manufacturer, and the stand of every pitchman. By extraordinary skill, the printed and spoken word together with the accompanying art

form and drama have become an alluring and attractive means of representation and confidence. Honesty in advertising is a concept worthy of re-examination."¹⁶ Finally, in R. v. Imperial Tobacco Products Ltd.,¹⁷ the Alberta Supreme Court, in prosecutions under s. 33(c) and s. 33(d) of the Combines Investigation Act, held that the standard applied under the U.S. Federal Trade Commission Act is applicable in this context and thus a "credulous man" test as opposed to a "reasonable man" test is what determines whether an advertisement is misleading under these provisions. If the influence of this test of deception is felt in the private law area, clearly the consumer's private law protection will be enhanced.

(ii) Terms and representations.

--Terms of the contract.

If the trend towards treating advertising claims as generally carrying legal consequences for breach is not merely transitory, advertising claims will fall within the rather confused area of representations of which there are three and terms of which there are four.

At common law, there grew up a clear distinction (since rendered less than clear) between terms of the contract and statements not intended to be contractual promises. The former are classified as terms and may be either promises or statements of fact and be construed as conditions or warranties. Moreover, the distinction has been further refined by two judicial creations of the last 25 years -- fundamental and innominate terms -- the former developed to enable the courts to avoid the effect of all-embracing exclusion clauses and the latter representing a laudable attempt to inject more flexibility into the law. The substantive distinction between the various terms will depend on the relative importance of each. A condition, for example, is considered to be an undertaking central to the contract in the sense that the contract would be substantially different without it; a warranty is less central. A fundamental term is a condition such that the contract would be incomplete or void of consideration if it were absent; and the innominate term expresses the reality that conditions and warranties may be of equal importance with respect to the breach committed and thus be deserving of the same remedy. It is, however, the remedial distinction which is of the greatest importance. If, for example, the term is construed as simply a warranty, the innocent party's only recourse is a claim for damages. If it is a condition,

he can both rescind and claim damages or merely claim damages by choosing to treat the term as a warranty thus leading to the anomalous position that a serious breach of warranty entitles one only to damages while the slightest breach of a condition allows rescission as well.¹⁸ However, the innominate term device may aid the unwary consumer as it enables the victim to rescind and claim damages for serious breaches of warranty.

A disappointed consumer faced with a false, misleading or deceptive advertising claim is clearly best advised to ground his action on breach of a term. However, not everything said or promised in the course of a transaction is a term. The rule laid down in Bannerman v. White¹⁹ that a statement is likely to be a term if its importance to the promisee is such that if the statement had not been made, he would not have contracted at all, has since 1913 depended on the elusive concept of intention. In Heilbut, Symons v. Buckleton,²⁰ the House of Lords determined that words which appear to be representations of fact may import a contractual warranty but only if it appears on the evidence to have been so intended, rejecting the test of De Lasalle v. Guilford,²¹ which asserted that a representation of fact of which the buyer was ignorant could carry the status of a warranty. However, the Heilbut, Symons test still gives the consumer some scope for argument as the test remains whether the reasonable (perhaps now the "credulous")²² man would construe the representation as a warranty.²³

While there is no clear test of which claims will be treated as representations and which as terms, there is a discernible tendency in the courts to extend the ambit of terms.

--Representations

Nonetheless, in some circumstances, the consumer may be forced to go the route of misrepresentation. While a representation is not part of the contract, it does have a legally operative effect and if the representation turns out to be false, relief may be available in equity or tort. The test of a misrepresentation that leads to relief is as follows: it must be a statement of fact inducing another to contract, giving rise to and promoting reasonable reliance thereon. The doctrine excludes promises or statements of opinion from this category unless they give rise

to or are predicated upon facts known to the maker of the statement. Thus, in a recent Alberta Supreme Court decision, a misrepresentation of present intention (a promise) was held to be a misrepresentation of fact and therefore actionable.²⁴

If the representation turns out to be false or deceptive so that a reasonable man would be misled as to its meaning, it may be of three types: innocent, fraudulent or negligent.

(a) Innocent Misrepresentation. If it is an innocent misrepresentation, made without fault on the part of the seller or manufacturer, then strictly speaking, in the absence of Canadian legislation similar to the U.K. Misrepresentation Act 1967, the victim is entitled only to the equitable remedy of rescission, a remedy limited in its scope which may be lost by the time the effect of the misrepresentation is discovered. However, an innocent misrepresentation may be construed as a term of the contract if it was so intended and induced the party to contract or as a collateral warranty. Nonetheless, it should be pointed out that in determining whether the claim is an innocent misrepresentation or binding promise the court has much discretion. Two very similar cases indicate the confusion in this area. In Oscar Chess v. Williams²⁵ the plaintiff car dealer acquired a second-hand car on the strength of a representation that it was a 1948 model. The defendant in this case was without fault and the court held that the representation was innocent as a reasonable bystander would not have construed the representation as anything more than a statement of belief. On the other hand, in Dick Bentley Productions v. Harold Smith Motors,²⁶ a similar case on the facts, except that the representor in this instance was the dealer, the court held that the representation was a warranty as it was made for the purpose of inducing the contract and did so induce thus affording prima facie grounds for inferring a warranty. The only difference between the two cases would appear to be the respective degrees of fault -- suggesting a merging of tort and contract tests of liability under a general reliance doctrine. In a consumer situation, it is arguable that the consumer will be able to meet the Dick Bentley test and therefore be able to proceed on the basis of contractual warranty. In fact, the method of classifying promises or statements may in the final analysis depend on the nature of the remedy that the court

wishes to give. Lord Denning has stated as much extra-judicially in commenting upon the Dick Bentley and Oscar Chess decisions:

In English law, an innocent misrepresentation may give rise to a right of rescission where that is possible, but not a right to damages. That has never given us any difficulty in practice. Whenever a judge thinks that damages ought to be given, he finds that there was a collateral contract rather than an innocent misrepresentation. In practice, when I get a representation prior to a contract which is broken and the man ought to pay damages, I treat it as a collateral contract.²⁷

(b) Fraudulent Misrepresentation. In contrast to the area of innocent misrepresentation, fraudulent claims pose few doctrinal problems. A statement is deemed to be fraudulent if it is known by the maker to be untrue or is recklessly made, giving rise to the right of rescission and an action in the tort of deceit for damages. While it is arguable that misleading advertising may often fall within this category, problems arise in the courts' traditional reluctance to make findings of fraud unless clearly proved. While there is evidence that the courts are willing to provide relief in the case of fraudulent claims, these have not generally been treated under the head of fraud but rather under equitable doctrines brought to bear when circumstances speak of gross injustice.²⁸

(c) Negligent Misrepresentation. Since the landmark decision of the House of Lords in Hedley Byrne v. Heller,²⁹ the concept of negligent misrepresentation has become an area of law carrying great potential for consumer redress in cases of misleading advertising. It is one of the few doctrines relevant to consumer law that incorporates the concept of injurious reliance upon a statement. In contrast, contract law is generally silent on the question of the liability of a party in commercial negotiations whose conduct has been reasonably relied upon by the other negotiating party to his detriment.

The only contract doctrine under which a claim might succeed in such a case is that of the law of mistake.

Mistake as to subject matter or as to quality so fundamental as to go to the essence of the product or to the essential terms of the agreement will void the contract.³⁰ Generally, contract law does not protect bad commercial judgments. However, the strictness of this rule is mitigated somewhat by the provision that if fundamental mistake as to quality was induced by the seller, the law will protect the reasonable commercial expectations of the promise. This, in Scriven Bros. v. Hindley & Co.³¹ where the purchaser was deceived as to the value of some hemp by the misleading nature of the catalogue and the conduct of the sellers, the purchaser was granted relief by the courts. Today this case would probably have proceeded on the basis of negligent misrepresentation or collateral warranty.

Thus, given the shortcomings of contract in this situation, the courts have created a duty in tort under Hedley Byrne giving rise to an action in negligence and a remedy in tort for damages where contract does not provide a remedy. Hedley Byrne has been applied in a number of cases in Canada. Babcock v. Servacar has been mentioned earlier as a case where advertising claims gave rise to an action for negligent misrepresentation. The potential that Hedley Byrne may afford in a consumer situation is further illustrated in a decision of the British Columbia Supreme Court in Dodds and Dodds v. Millman.³² In this case, a real estate agent was held liable in tort for negligent misrepresentation to a purchaser of an apartment block in respect of incomplete information that the agent gave to the purchaser in connection with the property. Liability was found on the simple proposition, that even in the absence of a contractual relationship, the defendant had made negligently false statements which he ought to have foreseen would be acted upon and which were in fact acted on. The doctrine illustrates the courts' willingness to relax strict contract doctrine (and with it, the requirements of privity and consideration) and to take cognizance of a looser reliance type relationship. It could, without much imagination, be applied to a large range of advertising claims and, in particular, avoid the problems of privity that have historically plagued contract law. In this respect, the implications of Hedley Byrne v. Heller, stated at their widest, are that unreasonable conduct in business relations, whether or not involving a contract, may attract liability for damage resulting to others.

An interesting application of the doctrine of negligent misrepresentation occurred recently in a California case, Hanberry v. Hearst Corporation,³³ where Good House-keeping was held liable for attaching their Seal of Approval to a line of dangerous shoes without careful prior testing of them. In Canada, Babcock v. Servacar³⁴ and Dodds & Dodds v. Millman,³⁵ suggest that such a decision is far from beyond the reach of Canadian courts.

--Negligent non-disclosure as misrepresentation.

One area where Hedley Byrne has been fruitfully developed in Canada has been the area of negligent non-disclosure in contractual relationships. The law of misrepresentation has recently been invoked to mitigate the harshness of the traditional common law rule that a seller, except in special categories of contract, is not under a positive duty of disclosure. Silence without more does not generally amount to misrepresentation and even knowledge by one party of mistaken assumptions made by the other party generally, will not, applying Smith v. Hughes,³⁶ expose the first party to liability.

Thus, before Hedley Byrne, non-disclosure was only actionable in limited cases under the law of mistake where one appears to be under a duty to inform others of errors concerning the subject matter or terms of the contract, though notably not errors regarding the quality of the subject matter. Smith v. Hughes³⁷ is the seminal case in the area. The plaintiff buyer in this case was looking for "good old oats". The defendant seller showed the plaintiff what he claimed were "good oats" and allowed the plaintiff the opportunity of examining them. The plaintiff bought the oats believing them to be "old" and the question confronting the court involved a resolution of whether the passive acquiescence of the seller in the buyer's self-deception would avoid the contract. While the court held that in this case it would not, it was also held that had the seller been aware that the buyer believed the oats to be warranted as "old" this mistake as to terms would have enabled the buyer to avoid the contract. In one respect this is simply one method of arguing breach of warranty or possibly misrepresentation.

In spite of the possibilities afforded by the law of mistake, clearly in many cases, these rules can cause

hardship. In order to mitigate this, Canadian courts have recently begun to make substantial modifications to the rule against liability for non-disclosure using tort law and not contract as the basis of liability. In Walter Cabott Construction Ltd. v. R.,³⁸ a government agency which failed to disclose to a tenderer the circumstances in which the tendered work was to be performed, thus causing unforeseen expenses, was held, applying Hedley Byrne, to have made an actionable misrepresentation. In such cases, the tenderer assumed to be under a positive duty not to withhold material information. Similarly, in Bango v. Holt,³⁹ where a real estate agent failed to disclose the full zoning status of a duplex to a potential purchaser, Hedley Byrne was again applied. And in Bank of British Columbia v. Wren Developments Ltd.,⁴⁰ a bank which failed to reveal to a guarantor in negotiating a renewal of the guarantee that it had released some of the securities of the principal debtor, was held to have engaged in an actionable misrepresentation.⁴¹ In Ames and Nickleson v. Investo Plan Ltd.,⁴² a contract for the purchaser of shares was set aside as a result of the seller's failure to disclose to the buyer that the prospectus in question had not been approved by the B.C. Securities Commission, though the court held that such non-disclosure did not amount to fraudulent misrepresentation. Similarly in Allesio v. Jovica,⁴³ an owner of a lot zoned to permit duplex construction knew of potential problems in obtaining a building permit due to sewage difficulties and did not inform the agent or purchaser of the problem. The court held that his silence on the matter did not amount to fraudulent misrepresentation but merely an innocent misrepresentation which resulted in total failure of consideration, thus rendering inoperative the disclaimer clause excluding representations other than in the written agreement. The plaintiff was allowed to rescind. In a recent Ontario case, Fines Flowers v. General Accident Assurance Co.,⁴⁴ a plaintiff relied upon the defendant insurer to provide adequate insurance coverage. Coverage was obtained but did not include an event which occurred. Fraser J. held the insurer liable in both contract and tort for failure to keep the plaintiff covered, as it was held to be his contractual duty to do, and in tort for breach of duty under Hedley Byrne in negligently failing to inform the plaintiff of the gap in coverage.⁴⁵

While Hedley Byrne appears now to be the most obvious means of fixing liability for non-disclosure, courts

have recently also founded liability for non-disclosure directly on the principles of Donoghue v. Stevenson,⁴⁶ modifying the previous judicial position that no action in negligence lay for purely economic loss.⁴⁷ In a recent Canadian case, Rivtow Marine Ltd. v. Washington Iron Works,⁴⁸ the Supreme Court of Canada held that both the manufacturer and the supplier of an article, both of whom know that the user relies upon them for advice, are under a duty to warn the user of possible defects in they are known to them, and are therefore liable in negligence under Donoghue v. Stevenson for the economic loss attributable to their failure to warn. Laskin C.J. and Hall J. would have extended the liability to cover cost of repair as well as loss of profits.⁴⁹ Similarly in Lambert v. Lastoplex Chemicals Co. Ltd.,⁵⁰ a manufacturer was held liable for the failure to warn explicitly of the danger involved in the use of a product.

Statutory Reform of the Characterization of Advertising Claims.

(i) *Statutory responses to puffery.* In the discussion of the common law treatment of advertising claims, the trend in the courts towards treating such claims seriously in a legal sense was noted. Now, three provincial Trade Practices Acts and business practices legislation in other jurisdictions have attempted to circumscribe severely the legal license traditionally accorded to "puffery". There would seem to be little doubt that in situations where reliance is promoted and the claim is used for the very purpose of inducing contract, the claim should be treated with more judicial or legislative significance than a "mere puff". It should, however, be pointed out that there will always be residual elements of puffery which are incapable of prohibition by reason of the difficulty of assigning to some advertising claims any objectively identifiable fact content. Nonetheless, it is possible to proscribe blatant exaggerations and innuendo where the reliance interest of the consumer is at stake. Both the British Columbia Trade Practices Act⁵¹ and the Ontario Business Practices Act⁵² have expanded upon the common law in this respect to include these elements of puffery. In both statutes, the use of exaggeration, innuendo or ambiguity as to a material fact is deemed to be a contravention of the Act. The Alberta Unfair Trade Practices Act,⁵³ Bill C-2⁵⁴ and the Australian Trade Practices Act⁵⁵ simply prohibit misleading or

deceptive conduct without specifically directing the legislation to exaggeration and innuendo.

(ii) *Statutory reform of terms and representations.*

The appropriate legal treatment of deceptive claims poses difficult conceptual and practical problems. As we noted in the discussion of the common law position, the rationale for a classification of claims lies in the remedial distinction made between the different classes of terms and representations. The latter part of this chapter deals with the remedial problem in detail and therefore our present concern is focussed on the types of claims which should be included within any category of actionable misconduct.

It is submitted that there is a clear need to abolish the distinction between terms⁵⁶ and representations and by so doing, to eliminate the need to prove intention on the part of the supplier that a representation be regarded as a contractual term. Such a merging of the two concepts is predicated upon the reality that representations are made for the purpose of inducing contracts and thus cannot meaningfully be distinguished from contractual terms. The concept of intention has no place in civil legislation designed to protect the consumer where the loss suffered is the same whether intention is proved or not. Similarly, from the consumer's perspective, there is little purpose served by defining, as the common law does, the nature of the supplier's conduct as innocent, negligent or fraudulent as the loss remains the same no matter how the conduct is defined. While there may be some merit in retaining distinctions in the criminal law between fraudulent, negligent and innocent misrepresentations, they have no place in the private law where the operative concept must be detrimental reliance on a misrepresentation, however innocently made.

To a large extent, the provincial Trade Practices Acts have followed this line of reasoning. All three acts prohibit deceptive, misleading or false representations without categorizing them as conditions, warranties or types of misrepresentation and provide civil relief inter alia where they occur.⁵⁷ Australia simply prohibits "conduct" which is misleading or deceptive and allows a civil action for loss occasioned by the conduct.⁵⁸ The Federal Combines Investigation Act amendments generally prohibit materially misleading or false representations giving via s. 31.1 a civil right of action for relief.⁵⁹ It should be noted

that in approaching the law of terms and representations by uniting the two categories under a single concept of prohibited conduct, the statutes have imposed a concept of strict liability for misleading advertising in civil claims.

(iii) *The statutory position on misrepresentation and non-disclosure.* At common law, the negligent failure to state a material fact is now beginning to be regarded as actionable misrepresentation.⁶⁰ However, the legal liability for non-disclosure in consumer transactions needs clarifying in any Trade Practices statute. While there may be an argument in favour of limiting the scope of non-disclosure so as not to require an unrealistically high level of altruism from a supplier, this has not generally been conceded in the Acts which have dealt with non-disclosure. The British Columbia Trade Practices Act defines non-disclosure as included within the general concept of deceptive act or practice as well as including it specifically within the list of deceptive practices where failure to disclose a material fact amounts to misrepresentation.⁶¹ The Ontario Business Practices Act contents itself with only the latter sanction.⁶² The Alberta Unfair Trade Practices Act does not direct itself generally to non-disclosure but specifies the categories of non-disclosure which are prohibited. Thus, in Alberta failure to disclose a defect in the goods or that any or all the services will not be provided is prohibited if the supplier knows the consumer is not aware of these facts and the defect will deprive the consumer of the benefit of the transaction.⁶³

The Tort/Contract Conflict in Post-Contractual Situations.

(i) *The common law position.* Up to this point we have considered negligent misrepresentation in non-contractual or pre-contractual situations. In Canada, it now appears that the doctrine does not apply in an on-going contractual situation. In J. Nunes Diamond Ltd. v. Dominion Electric Protection Co.,⁶⁴ where the purchaser of an alarm system for a jewelry shop, concerned over the adequacy of the system after a robbery of premises protected with the same system, was reassured following the purchase that his system would provide adequate protection, the Supreme Court held that:

The basis of tort liability considered in Hedley Byrne is inapplicable to any case where the relationship between the parties

is governed by contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of the contract as expressed in Elder, Dempster & Co. Ltd. v. Patterson Zochonis & Co. Ltd.⁶⁵

The decision strangely excludes a tort claim where a contract exists particularly in light of the established concurrent actions in tort and contract in cases of bailment and fraud, but it has been followed in later decisions. In Sealand of the Pacific v. Robert C. McHaffie Ltd.⁶⁶ Nunes Diamond was relied on to deny a tort action in negligent misrepresentation against an architect for misinforming ship owners concerning the suitability of certain ocean cement for adding buoyancy to their ship. On the other hand, at least one court seems to have ignored the decision completely.⁶⁷

(ii) Statutory reform of the Nunes Diamond problem.

Generally, actionable misrepresentation will occur before or during the process of contract formation. At common law, such a misrepresentation need only have induced a contract to be actionable. However, in Canada as a result of Nunes Diamond,⁶⁸ a misrepresentation during the course of the contract is not actionable in tort. There is good reason for disposing of this decision by statute. Such a misrepresentation may, while not inducing the formation of contract, induce the continuation of contract, mislead the consumer as to the utility of his purchase and so induce him not to remedy the defect or mitigate his potential losses. Thus, if the concept of misrepresentation is to be all inclusive it should cover all claims made before, during or after the consumer transaction. Only B.C. has gone to these lengths in specifying that a deceptive (or unconscionable) practice includes those occurring after the consumer transaction takes place.⁶⁹ Ontario, Alberta, Australia, and the Federal Government assume the remedies are available only if the representation induced the contract or in the Alberta Act occurred "in the course of inducing persons to enter into a consumer transaction" whether or not the transaction actually took place. The advantages of the B.C. approach are not confined to the Nunes Diamond situation which admittedly will be a rare occurrence, but extend to many other situations. For example, post-contractual collection practices could readily be regulated within a

a trade practices regulatory framework.

Remedies Available For Breach Of Contract And Misrepresentation

The Common Law Approach. The previous discussion noted the remedial consequences of the present structure of the substantive law categories. Traditionally, at common law the importance of the distinctions in the obligations undertaken or claims made lay in the remedies available for each class of obligation. These distinctions differentiate between claims which are fundamental and those less fundamental. Thus, as noted above, breach of condition gives rise to a claim for rescission and/or an action for damages while breach of warranty gives rise to damages only. The remedy is afforded irrespective of the nature of the breach on the basis of the substantive distinction. The shortcomings of this position are obvious. The most serious objection to the traditional common law approach is its inability to take account of the effect of the breach. As the distinction is made on a a priori classification of the claim, the remedy can make no realistic assessment of the result of the breach and may lead to the anomalous consequence that for a minor breach of a fundamental obligation or claim, the consumer may rescind and claim damages but in the case of a serious breach of a non-fundamental term, where rescission may be appropriate, the remedy is barred. Clearly, the formalistic nature of such an approach has little to commend itself.

However, the common law has recently developed an internal flexibility enabling it to mitigate some of the anomalies of the traditional approach. In Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha,⁷⁰ the court developed the concept of an "innominate" term. Thus, while the distinction between fundamental and non-fundamental (i.e. condition and warranty) is maintained, the development of a concept recognizing the "grey area" between the two allows a court to focus on the nature of the breach as determining whether the consumer is entitled to a "fundamental" remedy.

Damages at Common Law. As most claims will sound in damages, the measure of damages is crucial.⁷¹ The general rule in contract is the principle that an award should put the plaintiff in the same position he would have been in had the contract been performed, or in other words,

provide damages for loss to the expectation interest.

Where the expectation interest is not appropriate and in circumstances where the expectation interest does not cover all losses, contract law will award damages based on the loss occasioned to the reliance interest in which case the plaintiff is put in the same position he was in before the promise was made. A special incidence of the reliance interest but deserving of recognition as a separate interest involves a situation where the plaintiff has conferred some value upon the defendant in reliance on a promise or representation and the contract is never performed. The interest protected here is the restitution interest, the purpose of which is to recoup to the plaintiff the consideration paid and thus prevent unjust enrichment.

What is included under these various heads is a matter of some importance. The rule by which contract law is governed is known as the rule in Hadley v. Baxendale,⁷² which permits recovery for direct damages and reasonably foreseeable consequential damages. However, to state this in the abstract is not to state very much for the rules do not specify the qualifications imposed by subsequent case law. While this is not the appropriate forum for a detailed analysis of contract damages, it is worth stating shortly the shortcomings of the existing law.

First, contract generally only takes into account quantifiable financial loss, leaving to tort and the criminal law punitive damages. Secondly, a general rule of damages in contract excludes those damages deemed to be the exclusive domain of tort i.e. damages for mental suffering, inconvenience, or distress. This rule was first qualified in Hobbs v. The London and South Western Railway Co.,⁷³ where Cockburn J. held

Now inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this... If the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned and that it has been occasioned as the immediate effect of the breach of the contract, I can see no reasonable principle why that should not be compensated for.⁷⁴

More recently in Bailey v. Bullock,⁷⁵ Barry J. laid down a distinction between those damages which were recoverable -- i.e. "substantial inconvenience and discomfort" and those unrecoverable -- for "annoyance or mental distress". The distinction was abandoned in Jarvis v. Swan Tours.⁷⁶ The plaintiff had purchased a vacation for a skiing holiday which included a number of additional benefits. The actual holiday far from met the expectations engendered by the sales brochure and resulted in great disappointment and annoyance. Lord Denning in dismissing Barry J's distinction expressly allowed damages for mental distress.

In a proper case, damage for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and the frustration caused by the breach.⁷⁷

In Jackson v. Horizon Holidays Ltd.,⁷⁸ a more recent Court of Appeal case, Lord Denning applied Jarvis in awarding damages for discomfort, disappointment and vexation resulting from the defendants' breach of contract for a holiday for the plaintiff and his family. The importance of the case lies not only in the further application of "enjoyment" damages within a contractual situation but in the expansion of this concept by Lord Denning to allow damages in respect not only of the plaintiff's losses but also those of his family, not parties to the contract. Citing the old Chancery case of Lloyds v. Harper,⁷⁹ which until this decision had been thought to be limited to a trust situation, Lord Denning determined that in cases where an individual makes contract for the benefit of a third party, he can sue on the contract and recover damages on behalf of the third party. The importance of this recognition lies, of course, in the implications it has for the avoidance of privity.

Jarvis has been applied in at least one case in Canada. In Keks v. Esquire Pleasure Tours et al,⁸⁰ the plaintiffs were awarded \$800 for mental distress as a result of the defendant's failure to provide promised accommodation during a family holiday. Similarly, in an Australian case, the plaintiff was awarded \$400 for dis-

comfort and inconvenience resulting from breaches of a contract for a holiday in Cyprus.⁸¹

Statutory Reform of Remedies.

(i) *Methods of approach.* The present state of common law remedies for breach of contract and misrepresentation has attracted much comment and criticism⁸² and the need for reform in this area is pressing. The problems noted in the common law approach result from the fact that the remedies available to the consumer at common law depend almost entirely on the nature of the obligation which has been breached and only in limited cases on the severity of the breach.

Solutions which have been presented to the common law approach tend to be built around a conceptual apparatus that is both formidable and confusing. It is submitted that the approach which should be pursued is to free oneself from the formalism of the present law and the conceptual straitjacket imposed by it.

In the last few years, several extensive reforms to our structure of remedies have been proposed or enacted. The analysis that follows examines three possible approaches.

The Ontario Law Reform Commission in the Report of Consumer Warranties and Guarantees in the Sale of Goods,⁸³ proposed an alternative to the common law approach which is similar to the Hong Kong Fir concept of the "innominate term".⁸⁴ This alternative contemplates the abolition of distinctions based on the nature of the obligation and the substitution of a redress regime where the remedy is determined by the nature of the breach. The Commission recommended that a distinction be maintained between those breaches which are remediable and are not of a fundamental character and those of a fundamental nature where the product departs significantly in characteristics or quality from the contract description, is substantially unfit for its specified purpose or is a hazard to health or property. In the first case, the supplier is given a reasonable opportunity to make good the breach and if he does not do so the purchaser may rescind and claim damages or remedy the defect elsewhere and claim damages. In the second case, the purchaser receives the normal contract remedies for breach of condition - rescission and/or damages.

On the one hand it is difficult to see how the approach differs in substance from the Hong Kong Fir approach except through the complete abolition of any substantive distinction between different types of terms. Like the Hong Kong Fir approach, it is highly discretionary and in spite of an elaborate attempt to define the distinction between fundamental and non-fundamental breach, there remains a degree of uncertainty over the precise category into which a seller's breach will fall.

This approach differs from Hong Kong Fir in its development of the concept of a remediable breach. It is arguable that where a defect is curable the right to reject the goods should be conditional upon giving the party in breach a reasonable opportunity to remedy the defect. The Uniform Commercial Code article 2-508 makes provision for this and it is not entirely alien to our case law.⁸⁵

The advantages of the concept are fairly obvious. The supplier gains a certain amount of protection against peremptory rescission and is allowed to demonstrate his good faith. Without resort to court action the consumer can demand that the defect be remedied under threat of rescission. However, the disadvantage of the approach, particularly in respect to misleading advertising, may outweigh whatever advantages it has. A general criticism of this approach, whether in the product warranties area or in relation to deceptive practices, is the additional element of uncertainty surrounding the form of redress. Under this method of redress, first the consumer must determine whether the breach is fundamental or not, then if not fundamental must determine the nature of a "reasonable opportunity to make good the breach" before resorting to his other rights. In as much as any formulation of remedies will represent a compromise between arbitrariness and clarity or between flexibility and certainty, it is suggested that the one step beyond the initial uncertainty created by the classification of the breach places too great a strain upon the system.

Apart from these general objections, the appropriateness of the OLRC approach to the area of deceptive practices is open to question. One is dealing here with positive misconduct that even if remediable arguably should not be the subject of a locus poenitentiae. Requiring a consumer to give the supplier a reasonable opportunity of curing the consequences of deception or unconscionability

makes unrealistic assumptions about the amount of confidence most consumers will feel they can reasonably place in a delinquent supplier.

A second alternative for reform might again contemplate no distinction between the obligations undertaken, the claims made or the practices committed. However, in addition, one might argue that no firm remedial distinction should be made on the basis of the nature of the breach, there being a presumption that all breaches involve a substantial impairment to the value of the goods or services until proved otherwise by the supplier. Thus, like the discretionary nature of the remedy for innocent misrepresentation under the U.K. Misrepresentation 1967,⁸⁶ discretion is vested with the court to undo the harsh results which may sometimes follow from rescission. The difference between this approach and the OLRC proposals, apart from the requirement of the latter that the buyer allow the seller an opportunity for remedying a non-fundamental breach, is the reversal of the onus of proof. Whereas, in the OLRC proposals it is necessary for the consumer wishing to rescind outright to bring himself within the rubric of "fundamental breach", an onus similar to trying to show a term to be a condition, this solution assumes the breach to involve a substantial derogation from the contract -- the test being the effect on the value of the goods -- thus placing the onus on the offender to show that the breach was not substantial in its impact if he wishes to avoid rescission.⁸⁷

The advantage of this approach over the OLRC position lies in the greater certainty afforded the consumer in relying on his rights, the likely reduction in potential litigation and its greater deterrent effect. The disadvantage lies in an element of arbitrariness and sometimes harshness for a supplier flowing from the presumption that all violations justify rescission. However, a provision giving the court the ability to deny rescission where this is challenged should in most circumstances be an adequate safeguard. The most compelling objection lies again in the uncertainty injected into the law in that a consumer who rescinds will not know immediately if his rescission is valid until the limitation period for the commencement of an action for relief from rescission has lapsed. This can be mitigated somewhat by the development of appropriate procedural mechanisms but it can never be entirely removed.

The final alternative is an extension of the approach taken in the Ontario Business Practices Act.⁸⁸ Here, again, no distinction is made between the types of claims or practices and no remedial distinction is created, thus allowing the whole range of remedies available for a breach, including rescission. The objection to this approach is the possible harshness of rescission as a remedy in all situations. However, it is worth recalling that rescission is given for innocent misrepresentation in the present law irrespective of the gravity of the misrepresentation. Thus, this approach neither offends nor extends existing concepts. Moreover, the advantages of this approach are consistent with the objections of consumer legislation. Our concern is with realistically attainable forms of redress and this alternative seems to satisfy criteria both of efficiency and accessibility in that the remedy of rescission is to some extent self-executing, often enabling the consumer and the supplier to avoid litigation where damages are not claimed. The only issue that is susceptible to dispute and litigation is whether a violation has occurred not its gravity or the quantum of damage sustained by the consumer.

(ii) Types of remedies available by statute.

Within trade practices legislation, civil remedies tend to follow the common law precedents and are basically of two types: those involving the termination of the contract and those requiring the loss to be made good. The former classification covers rescission, voidability and the rendering of the contract void or unenforceable for certain breaches. It is submitted that in spite of the provision in the B.C. Act making unconscionable transactions unenforceable,⁸⁹ the approach of voidability and unenforceability is not to be recommended. In the first place, the terms themselves are confused and misunderstood. Secondly, unenforceability may not be the appropriate form of relief in every circumstance. The approach also involves a categorization of those practices which are deserving of a declaration of unenforceability and those which are not, a process inconsistent with previous analysis.

Moreover, the single concept of rescission covers in practice the function performed by the "void" or "unenforceable" contract without involving unsettled concepts or needless classifications. In the three provincial Trade Practices Acts, rescission is available to the consumer for contracts made subject to a deceptive or unconscionable

practice. However, it should be pointed out, that rescission in the Alberta and B.C. Acts is not an automatic right vested in the consumer at the outset, but is left to the discretion of the court with no direction as to how and when the court should exercise this discretion.⁹⁰ The Ontario Business Practices Act, on the other hand, provides for rescission for all violations. Section 4 gives the consumer the right to rescind within six months of the transaction for all violations of the Act by giving notice to the other party. It is submitted that the self-executing element often present in rescission argues for this type of solution, particularly when viewed in the context of present problems of consumer access to the legal system, where without the protection of a right of rescission, the consumer may be left with no remedy at all.

Obviously, rescission cannot be the sole relief available. In some cases rescission will be an adequate remedy but in many circumstances the consumer will have incurred additional losses as a result of a deceptive or unconscionable practice. As well, in other cases a consumer will be happy with an adjustment to the consideration and will not want a termination of the contract. We are therefore left with the problem of the treatment of damages by statute. The common law position in respect of compensation was noted earlier and by and large the statutes have done little to expand upon the common law. The provision for compensation in the three provincial Trade Practices Acts,⁹¹ Bill C-2⁹² and in the Australian Trade Practices Act⁹³ are all briefly worded, basically allowing compensation in the amount of loss or damage without specifying the method of calculating that loss or damage and the types of loss which should be compensated. Because of the highly discretionary and uncertain nature of a recovery at common law on which the consumer is forced to fall back in the absence of direction in the statutes, it is submitted that legislation should direct itself to the measure of recovery, specifying the types of loss and damage to be included within relief given as well as the measure of recovery. This, the appropriate section in an Act, directed at consumer relief, would include the right to recover for losses occasioned by reliance upon the supplier's claim, for losses occasioned to expectations reasonably entertained by the consumer as a result of the claim, the right to restitution of money or property, and the right to recover damages for loss of enjoyment or inconvenience (i.e. "pain and suffering" damage).

The U.S. Uniform Consumer Sales Practices Act has an interesting and useful addition to the normal damages recovery. In Section 11(b), the Act provides for a minimum recovery of \$100. The importance of this section lies in the incentive it gives a consumer to sue in a case where an action for a deceptive or unconscionable act would not normally be financially worthwhile.

Punitive damages are also appropriate in the present context. At common law, punitive damages only lie in a tort action. However, there is no reason to restrict liability under a statute exclusively to traditional contract remedies and thereby eliminate the tortious claim for punitive or exemplary damages, particularly as the analysis in this paper has suggested that a merging of aspects of tort and contract law is justified in this contest. Moreover, our concern is with deceptive and unconscionable practices - i.e., those considered to be outside the realm of acceptable commercial behaviour, and in some circumstances they may be deserving of an additional civil penalty. At present, all three provincial Acts have provisions for an award of exemplary damages. Section 4(2) of the Ontario Business Practices Act is the most limited as it confines the award of punitive damages to those practices deemed by the act to be "unconscionable". Section 20(1) of the B.C. Act and Section 11(2) of the Alberta Act allow recovery of punitive damages at the discretion of the court for the commission of any of the acts or practices outlined in the act, whether deceptive or unconscionable. Neither the amendments to the Combines Investigation Act nor the Australian Trade Practices Act have provision for any award except for "loss or damage suffered". If the punitive damage concept is to be incorporated into law by statute, as we advocate, the B.C. and Alberta provisions are satisfactory instruments for achieving this. While the Ontario distinction is understandable in the abstract, in practice it seems difficult to justify. In a later section of this paper, the validity of creating a distinction between deceptive and unconscionable practices is reviewed and it is argued there that while in some cases the distinction is tenable, the line of demarcation between the two is often artificial.⁹⁴ Allowing punitive damages for one type of practice and refusing it in another asserts an ethical differentiation between deception and unconscionability based only on an a priori classification of practices. It would seem wiser to allow punitive damages in the discretion of the court for all

practices defined by the statute and allow circumstances to dictate the relevance of an exemplary award.

Having determined the types and scope of damages that best fit the needs of consumer protection, it still remains to be seen how the claim for relief should be structured. In our discussion of rescission, we argued that rescission should not be the sole relief available to the consumer as circumstances do not always demand rescission. Similarly, it is arguable that damages as the sole remedy suffers from the same drawbacks as rescission alone. In the first place, limiting a claim to damages alone seems unduly arbitrary. There will be many circumstances where it is totally unreasonable to restrict a claim to damages, for example, where the goods do not conform to the description, where the defect is incurable or where undue pressure has been exerted on a consumer to enter into an agreement.

However, damages is the only form of civil recovery provided in the amendments to the Combines Investigation Act,⁹⁵ and the Australian Trade Practices Act.⁹⁶ Both these acts limit the remedies available to a claim for damages in the amount of loss suffered without specifying how that loss is to be calculated and without specifically allowing other recognized legal and equitable remedies available to the consumer. However, under both Acts, the consumer's existing common law rights are not excluded or limited.

Clearly, allowing both rescission and/or a claim for damages is the most appropriate combination of relief in the circumstances. The consumer has several alternatives open and can choose himself which best fits his particular circumstance. He can rescind or, he can rescind and claim damages or he can elect to keep the goods and claim his losses under the bargain.

Disclaimer Clauses, The Parol Evidence Rule And The Doctrine Of Privity: Possible Impediments To Consumer Private Law Redress

The Widespread Use of Disclaimer Clauses. One of the problems a consumer may face when asserting a claim for misleading advertising based on misrepresentation or mistake is the widespread use of exemption clauses which exclude all representations and warranties other than those contained in

the written agreement. This, coupled with the parol evidence rule, which excludes evidence which adds to, varies or contradicts the terms of the written agreement, would seem to impose severe restrictions on the ability of consumers to sue for false claims. Problems arise where one party enters into a written agreement on the strength of a representation which is later found to be false but which is denied any operative effect because of a disclaimer clause in the written contract. Courts do not view such clauses with great favour and have struggled to circumvent them in various ways.⁹⁷

(i) *The judicial response to disclaimer clauses.*
The basic rule of law that one has to overcome is the provision that one is bound by a contractual agreement he has signed even if he has not read the document.⁹⁸ In such cases, the doctrine of reasonable notice is of no avail as it applies only to situations involving unsigned documents (the "ticket" cases) where the respective liabilities of the parties must be brought to the notice of the promisee at the time the contract is formed. The principal judicial response to disclaimer clauses has been the evolution of the doctrine of fundamental breach, developed from an old body of shipping law known as deviation. The basis of the original doctrine lay in the notion that a disclaimer can only avail a party when carrying out the contract in its essential respects. Thus, very serious breaches (those going to the root of the contract) were held to prevent a party from relying on the exemption clause and in Karsales (Harrow) Ltd. v. Wallis⁹⁹ it was elevated by Lord Denning to the status of a substantive rule of law. However, more recently the House of Lords in Suisse Atlantique¹⁰⁰ decided it was a rule of construction only. There are indications that the Canadian courts are more willing to follow the substantive rule of law approach¹⁰¹ and English decisions seem to have more readily accepted the Denning position, some in open defiance of Suisse.¹⁰² Thus, while lip service tends to be paid to Suisse and the test of intention, the courts seem to be fairly consistent in arriving at the same decisions they would have reached had Suisse never been decided and at least in Canada the case may have become a "monumental piece of semantic irrelevance".¹⁰³ Suisse aside, the basic weakness of the doctrine of fundamental breach is common to both the constructional and doctrinal approach, for in either case the courts purports to be working primarily, if not exclusively, with the document in front of it.¹⁰⁴ Either it

purports to construe it, or it purports to apply a substantive rule of law which automatically invalidates certain kinds of exemption clauses. However, in neither case is the court able to investigate the real considerations which render some exemption clauses objectionable. These necessarily lie outside the contract and in the relationship of parties, the course of negotiations between them and in the commercial setting of the transaction. Failure to explore these types of issues has led to decisions like Harbutt's Plasticine v. Wayne Tank and Pump Co. Ltd.,¹⁰⁵ where a substantial manufacturing concern operating a £200,000 factory was able to escape the effects of an exemption clause in a contract into which it entered, as far as one could tell, with its eyes open. There may have been good reasons, in terms of policy, for so holding, but these were certainly not articulated by the Court.

While the judicial motivation underlying the doctrine of fundamental breach is clear and commendable, the failure of the Courts to articulate a clear rationale for it and to frame a doctrine explicitly in terms of this rationale, has often set them upon a meaningless inquiry, and produced quixotic reasoning, and arbitrary decisions.

(ii) *Legislative responses to disclaimer clauses.*
Legislative innovations fall into several broad categories:

-- A Statutory Prescribed Form of Exemption Clause.

This is consistent with the norm of freedom of contract insofar as legislation simply prescribes the manner in which e.g. implied terms as to quality may be excluded by the parties.

An example of such legislation is afforded by s. 5 of the Australian Hire Purchase Act which enables the implied terms as to fitness and merchantability under the Act to be excluded in the case of second-hand goods by the agreement containing a statement to that effect and an acknowledgement by the hirer that the statement was brought to his notice. Section 18 of the U.K. Hire Purchase Act contains provisions to similar effect and the U.S. Uniform Commercial Code proceeds on the same basis. Section 2-316 of the Code states:

- (2) Subject to subsection (3), to exclude or modify the implied warranty of merchant-

ability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the fact hereof'.

(3) Notwithstanding subsection (2)-

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty...

The reasoning underlying provisions of this kind is clear enough. If the buyer is to forsake substantial rights made available to him under the law, then he ought to be made aware of this before agreeing to it. But how successful are these provisions in attaining this end? The provisions cited above can be complied with by the seller including printed form clauses in his standard form contracts. Then one is caught in the familiar bind: a buyer almost never reads such a contract; if he does, he does not understand the technical language involved; if he does understand it, it is unlikely that he can have the terms changed. The observations are borne out by experience. For example, in Australia all hire-purchase agreements in relation to second-hand goods invariably include the statutory statement, and the hirer in signing the agreement signs the necessary acknowledgement which is simply included amongst the terms of the contract. Thus the greatest value that this form of statutory exemption clause can have for the consumer is to emphasize to him the weakness of his own position.

-- Disclose or Perish

This category of statutory provision dealing with exemption clauses is also consistent with the norm of freedom

of contract, but instead of requiring the seller clearly to tell the buyer of his rights or lack of them, it requires him to tell the buyer of the fitness of the goods in question, or lack of it. To the extent that the seller fails to disclose to the buyer the true condition of the goods, to that extent will he be taken to assure their fitness.

One of the earliest examples of this form of legislation is s. 18(2) of the U.K. Hire Purchase Act, 1965. This provides that where goods are sold under a hire-purchase or conditional sale agreement subject to defects specified in the agreement (whether referred to in the agreement as defects or by any other description to like effect), and --

- (a) The agreement contains a provision that the condition referred to in s. 17(2) of this Act [i.e., merchantable quality] is excluded in relation to those goods in respect of those defects, and,
- (b) it is proved that before the agreement was made those defects, and the provision in the agreement so excluding that stipulation, were brought to the notice of the hirer or buyer and the effect of that provision was made clear to him, the condition shall not be implied in the agreement in respect of those defects.

A similar provision is s. 58 of the Manitoba Consumer Protection Act, 1969, which provides that every retail sale and hire-purchase of goods, notwithstanding any agreement to the contrary, contains "a condition that the goods are of merchantable quality, except for such defects as are described". Section 58(2) states that for the purposes of the foregoing provision, "it is not necessary to specify every defect separately, if the general condition or quality of the goods is stated with reasonable accuracy".

--Invalidating Disclaimer of Rights by Statute.

Most of the present Canadian legislation with respect to disclaimer clauses is a matter of provincial concern. The provinces have enacted various statutes restricting or outlawing reliance on disclaimer clauses in

areas such as the sale of farm machinery, sale of consumer goods and conditional sales. Four out of 10 provinces have legislation prohibiting or regulating the use of disclaimer clauses in the sale of farm implements.¹⁰⁶ All these acts imply warranties in favour of the retail buyers and make any attempt to contract out, void. Several provinces have enacted provisions in their Consumer Protection Acts or Sale of Goods Acts that prohibit the exclusion of statutory warranties and conditions. Such legislation now exists in Saskatchewan¹⁰⁷ with respect to hire-purchase and conditional sales agreement, in Manitoba¹⁰⁸ with respect to retail sales and hire-purchase agreements, in B.C.¹⁰⁹ with respect to retail sales and in Ontario¹¹⁰ with respect to consumer sales.

Recent provincial trade practices legislation has been severe on the use of disclaimers. The three provincial Trade Practices Acts have defined the consumers rights and remedies and then simply provided that the provisions of the Act apply notwithstanding any agreement to the contrary ¹¹¹ and the Australian Trade Practices Act makes void any terms which attempt to exclude, restrict or modify the application of the Act or any right conferred by the act or the liability of the supplier.¹¹²

Each of these acts addresses itself only to disclaimers of the rights created by the Act itself. However, amendments earlier proposed to the Combines Investigation Act attempted to go further. Section 36(4) of Bill C-2 stated:

For the purposes of this section,

- (a) a warranty or guarantee that limits in any respect the liability of the person giving it to a standard that is lower than the standard that, but for such warranty or guarantee, would be imposed on him by any law of general application in a place in Canada where the warranty or guarantee purports to apply, is misleading in material respect unless that fact is clearly stated in the warranty or guarantee;

Section 36(4) attracted several criticisms.

Professor Jacob Ziegel in a recent paper¹¹³ concluded that s. 36(4) made no serious contribution to the resolution of major consumer problems with warranties and disclaimers and points out the following weaknesses. In the first place, he argued that most warranties would not be caught by this provision as they originate with the manufacturer and yet provincial sales law is only applicable to the immediate seller -- the retailer. Moreover, given the affirmative disclosure requirements of the provision, most retailers would forego the use of warranties altogether. The most serious objection made by Ziegel is that 36(4) misconstrued the existing law in that under many provincial sales laws the seller is not obliged to offer any warranty and yet under 36(4) if he did, he might have been engaging in a deceptive practice. Apparently in the light of these criticisms, the provision has been dropped from the current version of the amendments.

The most satisfactory approach would seem to indicate a prohibition on disclaimers of rights and liabilities arising under the immediate Act leaving other problems of disclaimer clauses to be dealt with in separate legislation that can be more precisely attuned to the particular policy context.

The Parol Evidence Rule.

(i) *The common law position.* A rule of law that sustains the negative effect of disclaimer clauses is the rule regarding parol or extrinsic evidence which limits power of the court to construe a contract according to the reasonable expectations of the consumer.¹¹⁴ While it is arguable that recent decisions in Canada and England have seriously eroded the rule¹¹⁵ it still exists at least in form and unquestionably in part, in an uncertain substance. The general rule posits that no evidence will be admitted to add to, vary or contradict the terms of the written agreement. Thus, strictly speaking the consumer is precluded from giving evidence of oral assurances or representations unless he can bring himself within the exceptions to the rule. Unfortunately, the response of the courts to the rule has been to create increasingly extensive exceptions rather than specifically to repudiate it. As the rule has been formulated in terms of the exceptions, it is worth briefly examining them.

In the first place the rule operates only when the

written document is intended to be the entire contract. The logic of this creates a "self-evident tautology".¹¹⁶ Thus, the "rule" comes to this: when the writing is the whole contract, the parties are bound by it and parol evidence is excluded; when it is not, evidence of other terms may be admitted.¹¹⁷ The question then becomes one of the parties' intention. There is still a strong presumption that a contract in writing is complete but it is never more than a presumption. Thus, clearly parol evidence can be admitted to add to the written terms of the written agreement in proper circumstances. The most common method of ensuring admissibility is to establish the existence of a collateral contract that would maintain the sanctity of the main contract. Both Lindley v. Lacey¹¹⁸ and Byers v. McMillan¹¹⁹ establish this proposition. However, both limit its effect to the extent that the oral representation must be a distinct collateral agreement which could be made independently without writing and is not inconsistent with or contradictory to the main agreement.¹²⁰

In fact, while the collateral contract device is a useful tool for mitigating the harshness of doctrine, because it was developed as an exception to the parol evidence rule the result has been the continued existence of the traditional form of the rule coupled with the slow demise of its force.

Such is the strength of tradition that courts are often prepared to go to great lengths to find consistency between the collateral and main contract where flatly none exists. This was the situation in Francis v. Trans Canada Sales,¹²¹ where the court implicitly re-defined the test of consistency to avoid conflict with the parol evidence rule. In this case, Francis entered into an agreement for the purchase of a trailer with the appellant company. On the strength of certain oral representations made by the company's agent to the effect that the trailer carried with it a warranty, as for a new trailer, for one year's full coverage, Francis purchased the trailer. The fact of these oral representations was not at issue; it was agreed that the plaintiff had asked for the warranty in writing but it had never been provided. On the back of the standard form document comprising the contract were a set of terms and conditions including a so-called "exclusionary" condition, stating:

Purchaser acknowledges that the agreement

constitutes the entire contract and that there are no representations warranties or conditions, expressed or implied, statutory or otherwise, other than contained herein. Without limiting the generality of the foregoing, purchaser agrees that there is no warranty as to the "Year Model" even if stated herein.¹²²

In holding that the appellant company could not rely on this exclusionary clause, the court found that the prior oral representation made by the agent constituted a binding collateral contract, the consideration for which was the entering into of the main contract. In this case the test of consistency was the court's assumptions about the understanding of the ordinary person. In fact, under the guise of developing a test of consistency, the court was stating that the knowledge and understanding of the contract by the parties is the decisive factor -- almost an extension of the doctrine of reasonable notice. In affirming its position, the court relied heavily on Eisler v. Canadian Fairbanks Co.,¹²³ a similar case on the facts which reviewed the law relating to exclusion clauses and the implications for the parol evidence rule. In this case, the court extended the general legal principle that an exclusion clause will be construed very strictly against the person relying on it,¹²⁴ in holding that:

To exclude a representation from the operation of the contract, it seems that express language to that effect must be used, and that a general negating of conditions other than those expressed is not sufficient.¹²⁵

Moreover, the Court in Eisler went further in stating:

The language of the written agreement must be sufficiently clear that the average man entering into such contracts would know, if he gave it reasonable consideration, that he was debarring himself from relying upon the representation. The words used must not be reasonably capable of another meaning consistent with the retention of his legal rights.¹²⁶

It would now appear to be part of the law of contract that if a party is faced with a printed contract he

does not understand and a verbal warranty or representation he does understand and relies on it to his detriment, the court will allow the oral promise to stand.

To try to bring this reasoning within the scope of the parol evidence rule is a contrived exercise. The conclusion of the court in Francis, for example, is that the parol evidence rule is not contravened because the two clauses are not inconsistent; the reason they are not inconsistent is that the ordinary man would not understand them to be inconsistent. However, other recent decisions appear to ignore the problem of inconsistency and concentrate on the importance of the oral representation.

In Curtis v. Chemical and Dyeing Co. Ltd.¹²⁷ it was held that a contracting party cannot rely on an exemption clause if he has induced the other to accept it by misrepresentation. Thus, while one is bound by one's signature except in cases of fraud or misrepresentation, the court appears to have taken a very liberal view of what amounts to misrepresentation. Denning L.J. stated:

Any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption.¹²⁸

For example, the mere failure to draw attention to the existence of such a clause may in some cases amount to misrepresentation.

This concept of the precedence of oral representations was taken even further in Mendelssohn v. Normand where it was held that if an oral promise or representation has a decisive influence on the formation of the transaction-if it induces the other party to enter into the contract-it would be unjust to allow the maker to go back on it.¹²⁹ The effect of Mendelssohn may be to establish the principle that an oral promise inducing one party to contract will always take precedence over a written or printed condition.

At least one case has flatly rejected the parol evidence rule. In City of Westminster Properties Ltd. v. Mudd,¹³⁰ it was held that a verbal assurance in direct contradiction to the terms of a lease signed with full understanding of its contents by both parties was a collateral contract and prevailed over the lease.

Thus, given the disfavour with which the rule is viewed and the judicial strategies used to circumvent it, the continued existence of the parol evidence rule is a curious anomaly which still carries the potential for injustice as it is still liable to be taken seriously by some courts in verbal representation situations.¹³¹ In most consumer cases not to admit parol evidence is likely to cause injustice and in cases where it is excluded and the justification for its exclusion is given as the parol evidence rule, it is more likely that it is a failure of the evidence to disclose a sufficiently binding oral contract that is the cause of the exclusion and not the rule itself.

In spite of the apparent sweep of Mudd, as Professor Waddams points out the parol evidence rule may have its place where two equal parties have freely and carefully drafted a written document but it is not appropriate to a situation of a standard printed form where it is a fiction that the parties intend the writing to prevail over what has been said. In Waddams' view, the rule might well be restated as follows:

The signer is bound by the terms of the document if, and only if, the other party believes or has reasonable grounds to believe that those terms truly express the signer's intention.¹³²

So formulated, the principle would preserve the role of signed documents as a means of protecting reasonable expectations but it would not allow a party to rely on a document which he knows contradicts the reasonable expectations of the other party.

The point of this discussion of the parol evidence rule is as follows. Advertisements are by their nature oral or written representations concerning a product or service made with the intention of inducing a contract. Unless expressly included in the contract -- a rare occurrence -- under a strict construction of the agreement these representations will be excluded. However, the trend evidenced in the previous discussion is to bring the representations within the agreement through the collateral contract device or to recognize that such claims take precedence over the written terms so that the normal remedies available for breach of contract or misrepresentation become available.

(ii) *The statutory response to the parol evidence rule.* As shown in the discussion of the common law, the trend in the courts is to limit the scope of the parol evidence rule by creating substantial exceptions to it. The rule has no place in the consumer marketplace where commonly reliance is placed not upon the terms of a printed form contract but upon the representations, oral or otherwise, which induce the making of the contract.¹³³ The need to formalize the massive erosion of the parol evidence rule has been explicitly recognized in two of the three provincial Trade Practices Acts.

Section 27 of the B.C. Trade Practices Act and section 4(7) of the Ontario Business Practices Act explicitly abolish the rule with respect to consumer transactions covered by the Act. Alberta has not implemented a similar provision though it is implicit from the definition of unfair practices in s.4(1)(d) that parol evidence is admissible. Similarly, it is implicit in the prohibitory nature of the amendments to the Combines Investigation Act that the consumer who suffers damage as a result of conduct contrary to the Act is not to be limited by the parol evidence rule when bringing a civil suit under s. 31.1. The Australian Trade Practices Act is framed in a similar way in that contravention of the Act gives a right to civil action and the offences in turn are framed in such a way that the parol evidence rule is irrelevant.

It is arguable that the treatment of the parol evidence rule in some of the provincial Trade Practices Act is untidy. For example, in The B.C. Trade Practices Act, the elimination of the effect of the parol evidence rule is covered in three separate ways. First, deceptive practices are defined as "representations". Thus, if a supplier misrepresents a product or service in a respect covered by the Act, it is deemed a contravention. Whether it is oral or written is irrelevant. Secondly, s.2(1)(a) of the B.C. act specifically defines a deceptive act or practice as including an "oral" representation leaving no doubt that parol evidence must be included. Finally, s.27 abolishes the rule with respect to the Act. The specific abolition of the parol evidence rule by statute is over-kill in the sense that oral representations on which the consumer relies are covered already. However, in another sense, it is useful to provide specifically that parol and extrinsic evidence is admissible to permit evidence of surrounding circumstances relevant to

deceptive and particularly unconscionable practices to be reviewed.

In the light of the unsettled state of the common law on the parol evidence rule, it is submitted that Trade Practices legislation must address the problem of the admissibility of parol evidence by declaring that no rule of law that attempts to restrict the admissibility of parol or extrinsic evidence applies to proceedings under the Act.

The Doctrine of Privity.

(i) *The common law position.* The doctrine of privity, as developed by the law of contract, insists that parties be in direct contractual relationship before liability arises for breach of contract. It is a particularly unfortunate doctrine in light of the realities of the modern marketing milieu. The manufacturer tends to play the crucial marketing role in that it is he who is often responsible for placing the goods in the stream of commerce, creating public demand by extensive advertising and yet on a strict application of the doctrine of privity may not be legally responsible to the ultimate consumer for false claims he makes about his products.

Thus, as against the manufacturer, the consumer is in a less enviable position than as against the seller with whom he has a contractual relationship.

--The Manufacturer's Liability in Tort.

Tort knows no concept of privity. The closest doctrine to the contractual doctrine of privity is the "neighbour" principle laid down in Donaghue v. Stevenson¹³⁴ in which the test of a relationship sufficient to give rise to liability is the foreseeability of risk. However, except in cases of negligent non-disclosure and negligent misrepresentation, already canvassed, the tortious principles do not generally extend to economic loss but only to loss occasioned by personal injury or physical property damage.¹³⁵ The personal injuries cases recognize the logic of the marketplace as expressed above in viewing the middleman or the dealer as simply a conduit for the manufacturer who must be held ultimately responsible for the goods he places in the commercial marketplace. Thus in tort, a negligent manufacturer will be held responsible for a defective product in

spite of the absence of privity simply on the basis that it is reasonably foreseeable that the defective article will reach the consumer. Since Hedley Byrne a party responsible for a negligent misrepresentation may be liable for the ensuing loss despite the lack of any contract simply on the basis that reliance was reasonably placed upon the representation.

--The Manufacturer's Liability in Contract.

Though it may be not only reasonably foreseeable but intended that a false claim will be relied upon by the ultimate consumer, the loss occasioned by the claim may not be actionable in contract because of the doctrine of privity. However, the courts have moved towards mitigating the effects of the privity doctrine through the use of the collateral warranty device. The leading case proceeding on this basis is the famous case of Carlill v. Carbolic Smoke Ball Co.¹³⁶ The defendant, the manufacturer of a medical preparation, published an advertisement in the daily papers extolling the virtues of its smoke balls as a protection against influenza. The advertisement offered £100 to anyone who after buying a smokeball and using it as directed contracted influenza. The advertisement stated that a sum of £100 had been deposited with a bank as a measure of the advertiser's good faith. Miss Carlill, the plaintiff, purchased a smoke-ball from her local pharmacist on the strength of these claims but after using it contracted influenza. She sued for £100 and the Court of Appeal unanimously found in her favour. They were untroubled by the arguments that this was a mere puff that ought not to be taken seriously and that the contract of sale and purchase was with the pharmacist. Bowen L.J. said:

In order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect and I think that the effect which it was intended to have, was to make people use the smoke-ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke-ball as

distinct from the purchase of it. It did not allow that the smoke-ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke-ball should be promoted and that the use of it should be increased . . .

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke-ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and if he has made them, the extravagance of the promise is no reason in law why he should not be bound by them . . .

[The advertisement] is an offer to become liable to anyone who, before it is retracted, performs the condition, and although the offer is made to the world, the contract is made with a limited portion of the public who come forward and perform the condition on the faith of the advertisement . . . 137

For 1893, and the supposed hey-day of laissez-faire and caveat emptor, these are strong views indeed.

The real impact of the decision, of course, lies in the possibilities it suggests for circumventing privity considerations.¹³⁸ Today, we would analyze the case in terms of collateral contract. With the steady growth of this latter doctrine in many common law jurisdictions in recent years, and with the possibilities carried by it in relation to misleading advertising so well dramatized in Carlill's case, it is a minor mystery why so little attempt has been made to exploit the concept in the misleading advertising field in the Anglo-Canadian common law. All law students for decades have been taught Carlill's case, yet when one searches for what has been done with collateral contract in this context one searches almost in vain.

However, it is now clear that a manufacturer will be liable for breach of an express warranty if the warranty is intended to induce the customer to order the manufacturer's product from another person. The leading case is Shanklin Pier Ltd. v. Detal Products,¹³⁹ in which the plaintiffs, owners of a pier, on the faith of the representations of the defendant paint company, entered into a contract with the contractors to have the pier painted with the defendant's product. In the course of his judgment McNair J., stated:

If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

A leading Canadian case on this point is Traders Finance Corp. Ltd. v. Haley,¹⁴⁰ where the plaintiff succeeded in his action against Ford Motor Company for breach of warranty. In this case, Johnson, J.A., found in the circumstances that the manufacturer was the seller. He stated:

Where, as here, a purchaser goes to a manufacturer, makes known the purpose for which he required the equipment, is told the specific pieces of equipment shown to him would do the required job, then notwithstanding who may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion the seller within The Sale of Goods Act.¹⁴¹

While Johnson J.A., found it unnecessary to find a collateral warranty he appeared willing to apply the doctrine had it been necessary to do so, citing as authority the judgment of Lord Moulton in Heilbut Symons Co. v. Buckleton:¹⁴²

It is evident both on principle and on authority that there may be a contract the consideration for which is the making of some other contract.¹⁴³

In a case which promises to become something of a cause célèbre, Ranger v. Herbert A. Watts (Quebec) Ltd. and Peter Jackson Ltd.,¹⁴⁴ Haines J., of the Ontario High Court held a tobacco manufacturer liable to a consumer for breach of contract arising out of the purchase of a packet of cigarettes of a brand which had been the subject of an advertising promotion. Advertisements by Peter Jackson Ltd. claimed that purchasers of their cigarettes who found inside the packet a certificate of a stated denomination thereby won the stated amount of money. The plaintiff purchased a packet of the defendant's cigarettes containing a \$10,000 cash certificate from a local shop. The certificate stated that a skill-testing question had to be answered in order to qualify for the prize. The plaintiff posted off the coupon as directed and one evening received a telephone call from a representative of the defendants who required that a mathematical problem be solved over the telephone. The plaintiff was without his glasses and his wife was deaf, and in the general confusion, the plaintiff failed to answer the question correctly.

The case was complicated by the fact that a skill-testing question seemed necessary to take the scheme outside the lottery provisions (s.179) of the Criminal Code. The court appeared prepared to accept the view that the contract was constituted by an offer by the defendants in the form of the cash certificate which was accepted by the plaintiff in posting it off and agreeing to comply with its conditions. However, the court was prepared to read into the contract so constituted an implied term both that the skill-testing question be fair in substance and that the test be conducted fairly in the circumstances. The latter requirement had not been satisfied and breach of it entitled the plaintiff to recover by way of damages his prize of \$10,000. The foregoing analysis of the transaction does not entirely square with the judge's findings of fact. The judge found that Peter Jackson Tobacco Ltd. through their advertising led the public to believe that a purchaser of their cigarettes upon finding a certificate would without more than presenting the certificate receive the cash award.¹⁴⁵ On this analysis, the contract with the manufacturers, as in Carlill's case, should have been constituted the moment the purchase was made. The conditions on the certificate should have been irrelevant. The defendants should not have been able to require any test at all. The only explanation for this inconsistency in the decision would seem to be that, on the

latter view of the contract, problems of illegality might then have arisen under the Criminal Code.

It is instructive to turn for a moment to the U.S. experience to see how U.S. jurisdictions have utilized the same basic doctrinal tools presently possessed by Anglo-Canadian common law of collateral contract and the tort of negligence (aided often by the maxim res ipsa loquitur), in order to provide effective private law remedies for manufacturers' misleading advertisements. It is now widely recognized that a consumer has a right to sue a manufacturer for breach of express claims made in advertising material, despite lack of privity. Here the action is an action for breach of an express warranty.

One of the earliest cases so holding was Baxter v. Ford Motor Co.,¹⁴⁶ where the plaintiff lost an eye when a stone from a passing car broke the windshield of one of the defendant's cars that the plaintiff had purchased from a dealer. The manufacturer's advertisement had described the glass as shatterproof. The court, after pointing out the vast transformation that had in recent years occurred in merchandizing methods in the consumer marketplace, and the heavy reliance by manufacturers on sophisticated advertising techniques in order to promote ultimate sales, held the Ford Motor Co. liable for breach of its advertising claim. Instructive expositions of this decision are to be found in two later cases now regarded as seminal: Randy Knitwear Inc. v. American Cyanamid,¹⁴⁷ where Baxter's case was applied to a manufacturer's labels on a fabric falsely stating it to be shrinkproof, and Rogers v. Toni Home Permanent Co.,¹⁴⁸ where it was applied to manufacturer's advertisements and labels describing (falsely) a home permanent wave to be "safe and harmless".

The problem of privity is a problem related to fundamental notions of consideration. It is justified primarily on the basis that a stranger to a contract derives no consideration from it and is therefore not subject to any liabilities under it. If this is the sole justification, then it is clearly without meaning in a consumer context where the consideration moving to and from the manufacturer is obvious. In these circumstances the collateral contract device seems to be the obvious approach within contract law to deal with the false claims of a manufacturer. However, there are other recognized exceptions to the doctrine of

privity which may be invoked.

Agency is one of these exceptions. In cases where the manufacturer exercises close control over the distributor, as is the case in many dealership and franchise arrangements, it would seem possible to find the necessary agency relationship present. The problem with using agency as a device to circumvent privity is the difficulty often of satisfying conventional agency requirements.¹⁴⁹ However, a recent New Zealand case would seem to extend the concept of agency where the realities of the situation dictate it. In N.Z. Shipping Co. v. Satterwaite,¹⁵⁰ the issue concerned the question of whether the defendant stevedores who had been negligent in off-loading the plaintiff's cargo could claim protection of the contract between the plaintiff cargo-owner and the carrier. The court held that they could claim this protection. Relying on Carlill, the court determined that the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual between the plaintiff cargo-owner and defendants made through the carrier as agent when the defendants performed the services demanded (i.e. discharged the goods).

--The Common Law Responses to Related "Third Party" Abuses.

The discussion above focused on the problems posed by the absence of privity between a consumer and manufacturer. A related consumer problem occurs in the assignment of contracts and obligations.¹⁵¹ At common law an assignee of a contract is held to take "subject to equities" - i.e. subject to whatever obligations exist between the assignee and the original contractor. However, two related devices came to be commonly used to eliminate this contractual nexus. In order to assure that the assignee had a clear claim against the consumer and to avoid involvement in a consumer/supplier dispute, it became common practice to include within the original contract a "cut-off" clause by which the consumer undertook not to assert claims against the assignor against an assignee, and also to require the consumer to sign a promissory note, negotiated by the original seller to another party, usually a finance company, who would claim holder in due course status. Thus in many situations, the dealer may have misrepresented the product, it may have been defective or even non-existent and yet if the consumer had signed a contract with a cut-off clause or signed a promissory note he would still be liable to pay for the goods. Faced with

these practices, the courts reacted forcefully to retrieve the consumer's position.

For example, in Federal Discount Corp. Ltd. v. St. Pierre and St. Pierre,¹⁵² Kelly J. held that in some circumstances the finance company and the dealer may have a relationship so close and intimate that they may be considered as engaged in one enterprise with the result that the finance company cannot be considered to be a holder in due course and thus must take subject to equities. Kelly J. looked at the development of the sales law and stated that "in the course of this development an attempt has been made to project into the field of household law the law merchant originally developed for dealings between merchants. The fiction has been permitted to flourish that the finance company is a foreign and independent agent."¹⁵³

The courts clearly welcomed this initiative and Kelly J.'s decision did not go unnoticed. In a series of cases,¹⁵⁴ the concept of the unity of interest between the seller and finance company was recognized and used to avoid the "holder in due course" device in order to re-establish the consumer equities. In Beneficial Finance v. Kulig¹⁵⁵ these judicial developments were rationalized in a thoughtful judgment by Matheson Co. Ct. J. in which he identified the economic milieu in which a consumer transaction often takes place. Quoting Kelly J's conclusion concerning the finance company's status in today's marketplace, Matheson Co. Ct. J. states:

juridic recognition of this sociological fact is of paramount importance. For some time the economist has cast doubt upon the presumption of consumer sovereignty in the modern market economy. I take notice of the widely popularized conclusion of Professor John Kenneth Galbraith relating to the management of specific demand, of his "Revised Sequence" which challenges the classic economic thesis respecting the unidirectional flow of instruction from consumer to market to producer. Galbraith has said: "We have seen that this sequence does not hold."

One cannot preside in Court without appreciating

the degree of collaboration obtaining between dealer and credit company in relation to the purchase of certain categories of product; in Galbraith's words, the degree of "management of specific demand".¹⁵⁶

(ii) *The statutory response to the doctrine of privity.* As was pointed out in the previous section, while mechanisms exist to circumvent the doctrine of privity, only recently have these mechanisms been at all extensively used by the courts. Thus, certainly in form and possibly in substance, the lack of a contractual nexus between the consumer and the representor may prove to be a formidable legal barrier.

Until recently, legislative responses to problems of privity have been very limited. For example, early in the century in Canada, the Western provinces adopted remedial legislation with respect to farm implements.¹⁵⁷ All the acts imply various warranties in favour of the retail buyer of the farm equipment and all provide that the manufacturer as well as the dealer is liable to perform these warranties and that in the event of a breach the consumer may maintain an action against the manufacturer, distributor or vendor or all of them. More comprehensive remedial legislation may soon be enacted in Ontario. The Ontario Law Reform Commission in its Report on Consumer Warranties and Guarantees in The Sale of Goods,¹⁵⁸ recommended that the doctrine of privity of contract be abolished in claims by a consumer buyer against the manufacturer and that there should be statutory rules in the proposed Act holding a manufacturer civilly liable for breach of both express and implied warranties.

It is submitted that legislation in the trade practice area must effectively address the privity problem as neither the present remedies in tort or the collateral contract device provide an adequate solution to the problems posed by either vertical or horizontal privity. The interconnected nature of the modern marketing and distribution processes dictate an obvious solution, a solution based on the concept of reliance. This would mean the abolition of the need for a contractual nexus and the recognition of a wider reliance nexus on which to base liability. In effect, this would incorporate the tortious "neighbour principle"

into consumer legislation. Provincial trade practices legislation has gone far in applying this approach and in doing so abolishing horizontal and vertical privity. Both B.C.¹⁵⁹ and Alberta¹⁶⁰ have extended the remedies available to classes of consumer by the definition of "consumer". While the common law generally will not protect a guarantor or a donee of a consumer who has received defective goods and who himself may have a claim for misrepresentation or breach of contract, the B.C. and Alberta Acts have specifically defined "consumer" to include a guarantor or donee thus solving the problem of horizontal privity though the guarantor or donee will presumably still have to prove reliance on the misrepresentation by the original representee in order to claim damages himself. The Ontario Act has no similar provision with respect to horizontal privity. Again B.C., expressly, and Alberta impliedly, have abolished vertical privity with respect to consumer representations as have the amendments to the Combines Investigation Act. B.C. has defined a "supplier" as a person who solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction "whether or not any privity of contract exists between the person and the consumer, and includes the successor to, and the assignee of any right or obligations of the supplier".¹⁶¹ Alberta defines "supplier" so as to include a manufacturer or distributor or a person who "solicits, advertises or otherwise promotes the use, purchase or acquisition in any manner of goods or services that are the subject of a consumer transaction" or "person who receives or is entitled to receive all or part of the consideration paid or payable under a consumer transaction, whether as a party thereto, or as an assignee or otherwise".¹⁶² Again, the Ontario Act is noticeably deficient in not addressing explicitly the issue of vertical privity. The shortcomings of the Ontario Act are basically the lack of clarity. Prohibitions have been enacted against a deceptive or unconscionable "consumer representation", rather narrowly defined as "a statement, offer, request or proposal (i) made respecting or with a view to the supply of goods or services, or both to a consumer, or (ii) made with the purpose of or with a view to receiving consideration for goods or services, or both, supplied or purporting to be supplied to a consumer".¹⁶³ While it is arguable that a manufacturer or distributor effectively "supplies" the consumer and receives consideration for the effort, the actual mechanics of the manufacturer, distributor, retailer relationship may preclude that finding.

Australia's solution is to simply by-pass the privity question by making it an offence for a corporation to engage in conduct which is misleading or deceptive and to give a civil right of action to a person who suffers loss by an act in contravention of the statute.¹⁶⁴

The amendments to the Combines Investigation Act dispose of privity in s. 36(1) which prohibits false or misleading representations made by a person "for the purpose of promoting, directly or indirectly, the supply or use of a product".

--Legislative Reactions to Assignment

While the courts were developing principles to mitigate other third party abuses such as cut-off clauses and promissory notes, parliament stepped in to codify developments in the latter respect in an amendment to the Bill of Exchanges Act. Section 191 of the Act now makes a holder of a negotiable instrument subject to equities in a consumer purchase. In the only reported case under the new enactment, the court held that s. 191 applied to the transaction and the finance company was subject to the defences available to the consumer against the seller.¹⁶⁵ Moreover, the court held that in the absence of s. 191 it would have found on the facts a sufficiently intimate relationship that the finance company could not claim the status of holder in due course.

Most Canadian provinces have now passed complementary consumer protection in legislation outlawing cut-off clauses and, subject to certain qualifications, subjecting assignees to claims available to the consumer against the original contractor.¹⁶⁶

Two of the three provincial trade practices acts have abolished the possibilities of similar abuse in this context. Both Alberta¹⁶⁷ and B.C.¹⁶⁸ have defined "supplier" to include the successor to or assignee of any right or obligations of the original supplier, thus making the assignee subject to the same liabilities as the original contractor.

Ontario has specifically determined the liabilities of assignees within the legislation. By s. 4(4) of the Business Practices Act the liability of an assignee of an agreement under which damages are being claimed is limited

to the amount paid to the assignee under the agreement.¹⁶⁹ Thus, in B.C. and Alberta, as no limitation is placed upon the liabilities of assignees, an assignee may find himself liable to the consumer for an amount greater than he received under the assignment. We believe that the Ontario provision represents a fair balancing of both parties' interests.

Unconscionability And Related Doctrines

The Common Law Position. The judicial developments evidenced above in the courts' attempts to police the activities of sellers and manufacturers in consumer transactions must in the final analysis be seen as predicated upon some judicial concern for fair dealing. Underlying the decisions themselves is a basic notion that the courts should use whatever legal mechanisms are available to them to right the wrongs perpetrated upon a weaker party by a stronger. Many of the developments cited in the above discussion show, at least in part, the courts' concern that a certain minimum of good faith be evidenced in any transaction. Doctrines such as fundamental breach, which is closely related to unconscionability, and which is based primarily on the need to maintain a reasonable equivalence of consideration, negligent misrepresentation based on the concept of reliance and the doctrine of mistake, reflect the concern that a bargain should be based on some measure of equality.

Recently the courts have gone further in specifically addressing themselves to the problems of inequality in bargaining power through revitalization of the general equitable jurisdiction of unconscionability.

Unfair bargains are not a recent phenomenon and courts have often been faced with unconscionable transactions which do not violate any specific legal precept. Both the common law and equity developed various doctrines to deal with the unfair bargain.

(i) *Contracts "void" for illegality.* The category of contracts "void" for illegality has been one response to this situation. Treitel¹⁷⁰ lists 22 types of illegal contracts, none of which relates directly to the problems of inequality of bargaining power the consumer faces in the modern marketplace. It is arguable that the doctrine of public policy (which accounts for 15 of Treitel's 22 illegal

contracts) could provide ample scope as its flexibility has been recognized judicially. However, for the most part the courts have tended to regard the categories of illegality as closed. While long ago Lord Halsbury denied that the courts could "invent a new kind of public policy",¹⁷¹ the Canadian position is not quite as dogmatic. In In Re Millar,¹⁷² the Supreme Court of Canada, reflecting on the jurisdiction of the court to develop a new head of public policy, decided that two conditions have to be met to justify the use of public policy as the basis of a decision: (1) the interest or safety of the State or the economic or social well-being of the State or the people as a whole must be at stake; and (2) harm to the public must be substantially incontestable. While this is still a fairly severe test to be met, it is not without potential for development in clear cases of unconscionable transactions and widespread use of unfair business practices.¹⁷³

Recently the House of Lords used the concept of public policy to void a contract in a clear case of unconscionability. In A. Schroeder Music Publishing Co. v. Macauay,¹⁷⁴ a young songwriter entered into an agreement with a firm of music publishers whereby the publishers engaged his exclusive services for five years, held full copyright to all songs and had full rights of termination and assignment with no corresponding obligations on their part to perform any services for the songwriter if they chose not to do so, and no corresponding rights in the songwriter for termination of the contract. In holding the contract void against public policy, the court introduced the notion of inequality of bargaining power and drew a distinction between parties bargaining on equal terms and contracts dictated by the party in a superior bargaining position. In the first case, it is presumed the terms are fair and reasonable. In the latter case, there is no such presumption and the court has the discretion to examine all the circumstances to judge if the terms are fair. Thus, in Schroeder, the House of Lords found the terms to be so unfair as to justify holding the contract void against public policy. Lord Diplock, in particular, noted the policy of the courts in refusing to uphold unconscionable contracts. He stated:

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to

refrain from exploiting his own-earning power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.¹⁷⁵

He noted that the question to be answered in the situation before the court was simply "was the bargain fair?", indicating that the courts are now willing in some cases to ignore conventional contract strictures against any concern with adequacy of consideration and determine whether there has been a fair exchange of values.

(ii) *The law of duress and undue influence.* The common law category of duress and the equitable rules of undue influence reflect the notion of the voidability of unconscionable transactions but both are historically limited doctrines which with isolated exceptions have been applied conservatively by the courts.¹⁷⁶ Duress is thought to be limited to "actual or threatened physical violence to or unlawful constraint of the person of the contracting party".¹⁷⁷ Equity has enlarged the scope of duress through the doctrine of undue influence but not so as to open significantly the category to consumer complaints of economic or psychological coercion.¹⁷⁸

--Undue Influence

The equitable concept of undue influence rests on the principle laid down by Lord Chelmsford in Tate v. Williamson:

Wherever the persons stand in such a relationship that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of

his position will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed.¹⁷⁹

While the concept appears broadly based, it has generally only been invoked in familial or similar relationships.

In Lancashire Loan Ltd. v. Black,¹⁸⁰ a daughter, without benefit of independent advice signed a series of promissory notes to cover her mother's rather extravagant spending habits. The transaction was set aside on the basis of undue influence coupled with inability to understand the consequences of her actions. In Allcard v. Skinner,¹⁸¹ a nun, who had under the rules of the convent disposed of her property by giving it to her sister superior would have succeeded in pleading undue influence had she taken action quickly enough for recovery of her property. More recently in Lloyds Bank v. Bundy,¹⁸² discussed later, and in Bullock v. Lloyds Banks,¹⁸³ the concept of undue influence was expanded. In the latter case, a young woman of 21 who inherited a substantial amount of money executed a deed on the advice of her father effectively eliminating her claim to the capital. In setting aside the deed on the basis of undue influence, the court held that the doctrine is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it but extends to any case where a person of imperfect judgment is placed or places himself under the direction of one possessing greater experience.

In Canada, as well, if a recent case is suggestive, undue influence would appear to be developing a more expansive reach. In Public Trustee v. Skovetz,¹⁸⁴ an old man, living in squalid conditions was persuaded by a social worker to move to a rest home owned by the defendant. After entering the home, he executed a power of attorney in favour of the defendant and later made him gifts of his savings. After an accident at the home, in which the old man fell, hurt his hip and until his death nine months later was completely disoriented, the defendant transferred all funds into his own name. The plaintiff Public Trustee then successfully sued for the return of the money. It was held by the B.C. Supreme Court that there was no evidence of "complete ascendancy" but circumstances suggested that "on the balance of probabilities there was a dominating influence over the deceased". More-

over the court found the relationship between the deceased and the rest home owner fell within the "protected classes" which, without evidence to the contrary, give rise to a presumption of undue influence. In so holding, Anderson J. extended the scope of protection to classes not hitherto protected "as a matter of policy" and in accordance with social change.

Thus, the significance of this decision lies in the now apparently more open-ended categories of persons or classes to whom the court will give protection.

--Duress

While historically duress was a doctrine limited to fear of loss of life, limb or imprisonment, the concept of duress has gradually expanded so as now to show some potential for development in the consumer context. While the present scope of the doctrine is not entirely clear from the case law, the central element of duress has remained unchanged. As the following early cases of duress of goods illustrate, in whatever situation duress is seen to apply, the consent to the agreement must in all cases have been coerced.

Duress of goods was one of the first developments from the early categories of the common law and from it other recognized forms of duress have been spawned. The rule applies now to the recovery of money paid in order to release property unlawfully detained on the basis that demand for payment by the detention of goods amounts to extortion. It has been applied principally in situations where property or business interests have been threatened in order to enforce an invalid demand. In Astley v. Reynolds,¹⁸⁵ a pawnbroker refused to release the property to the rightful owner unless payment greatly in excess of the original agreement was made. The owner paid under protest and recovered his money in an action founded on duress of goods.

The extortionary nature of the remedy is illustrated again in The Port Caledonia and the Anna,¹⁸⁶ where a tug owner called to save a ship demanded £1,000. The owner paid but in a later action the court held the agreement to be invalid as it was induced by compulsion and set it aside as extortionist.

Perhaps the most important development is the emergence of a doctrine of economic duress or "business compulsion" as American law tends to describe it. Here the doctrine is used to address the question of the exercise of superior economic power to coerce an economically weaker party¹⁸⁷ (as opposed to a party who is physically or mentally weaker) to agree to unfair contractual terms. In common-wealth law, the doctrine has usually been applied to situations of threatened breach of contract or refusal to perform a contract. In the Australian case of Nixon v. Furphy,¹⁸⁸ the vendor of a certain piece of property threatened rescission of the contract unless an amount in excess of the purchase price was paid. The purchaser paid to avoid the rescission but later recovered the excess on the basis that the payments were involuntary and made under protest. However, a different view was taken in another Australian case. In Smith v. Charlick,¹⁸⁹ the Australian Wheat Board demanded the profit retained by a miller, Charlick, from an increase in prices ordered by the Board under threats of cutting his supply of wheat. As the Board had a monopoly over wheat supply, Charlick was forced to pay and sued to recover the money. The Australian High Court, reversing a lower court decision held the payment was voluntary and rightful. The Board was allowed to retain the profits as threatening breach of future contract was not unlawful.

Duress has been used in situations similar to threatened breach of contract where one party refuses to perform or continue performance unless some additional benefit is conferred on him. A Canadian case would appear to hold that if the benefit involves an invalid demand for money, that money must be restored. In Knutson v. The Bourkes Syndicate,¹⁹⁰ the Supreme Court of Canada held that payments made by the plaintiff involuntarily and under protest at the insistence of the defendant (the vendor of real estate) to protect its position under an option and to secure title to lands it was bound to transfer to a third party, were recoverable. And in Mason v. The State of New South Wales,¹⁹¹ a payment for an ostensibly free permit to transport goods, not made voluntarily, was recoverable under the law of duress on the basis that the payment was made "under compulsion".

Finally, a statement by the New South Wales Supreme Court seems to open the concept duress to other categories of coercion. In Sundell v. Yonnoulates,¹⁹² the defendant had contracted to supply the plaintiff with material needed by

the plaintiff to complete a government contract. The material was unavailable elsewhere and when the defendant raised the price and demanded payment the plaintiff had no option but to pay the additional price. The court held that the agreement for the additional price failed for want of consideration and by reason of duress and extended the concept beyond its traditional limits.

...the right to recover money paid under "practical compulsion" is not limited to circumstances where the compulsion consists of a threat to refrain from performing a statutory duty, or a threat relating to the property (goods or land) or proprietary rights.....The compulsion may consist of every species of duress or analogous conduct applied to the person or property or any right of the person affected.¹⁹³

The notion of economic duress which seems embraced in these cases has yet to be fully accepted by Anglo-Canadian courts as a justification for invalidating a contract. However, recent developments indicate that it is now being assigned a larger role. The most significant case to date which points to developments in the area is Rookes v. Barnard,¹⁹⁴ a House of Lords decision in which officers of a labour union threatened a strike against B.O.A.C. unless the plaintiff was dismissed. B.O.A.C. responded to the threat by firing the plaintiff who subsequently sued the officers of the union successfully. The House of Lords expressly recognized the coercive power of the economic threat to strike in upholding the plaintiff's claim for damages though still maintained the requirement that one prove the threat to commit an unlawful act (in this case, a breach of contract) before the tort of intimidation was proved. The technicalities of tort aside, the importance of the case has in the explicit recognition of economic coercion as relevant in the circumstances. Unfortunately, economic duress in Anglo-Canadian law seems confined to the law of tort and has not yet achieved a mature status in the law of contract. However, Anson in his most recent edition in discussing duress in tort law states:

There is much to be said for the view that the concept of economic duress should at least be recognized in relation to the

negotiation of a contract, or even possibly that it should be recognized in the law of contract as a whole.¹⁹⁵

American case law is more pointed in its acceptance of the validity of economic duress. In reviewing the American position, two important points emerge: the element of coercion and the lack of consideration. This latter point is crucial in the expansion of duress to cover consumer situations. While basic contract doctrine will not judge the adequacy of consideration, the law of duress, in effect, rejects this norm to the extent that a disproportionate exchange of values raises at least the presumption of coercion.

In the U.S. the defence of economic duress is generally considered as the basis for denying the enforcement of the agreement; however some jurisdictions have expressly adopted the doctrine as a justification for rescission.¹⁹⁶

Typical of the American cases is Hochman v. Zigler's Incorporated,¹⁹⁷ where a tenant under the landlord's threat of eviction, which would have meant failure of his business, agreed to sell the business, and the landlord agreed to lease the premises, to third persons. The landlord then, by threatening not to carry out his part of the agreement, compelled the tenant to give him \$3,500. The New Jersey Court of Chancery held that the payment was made under duress and that the landlord was bound to restore this payment to the tenant. The court said that while duress requires acts that are unlawful or wrongful, this does not mean that they must be criminal, tortious or in violation of a contractual duty.¹⁹⁸ The court added that "judgment whether the threatened action is wrongful or not is colored by the object of the threat. If this threat is made to induce the opposite party to do only what is reasonable, the court is apt to consider the threatened action not wrongful unless it is actionable in itself. But if the threat is made for an outrageous purpose a more critical standard is applied to the threatened action."¹⁹⁹

In another leading case,²⁰⁰ the plaintiffs paid a sum of money to the defendants in order to avoid a mortgage foreclosure. In fact, the debt had already been repaid and the defendants were falsely claiming the debt. The court allowed the defence of duress in stating:

Under modern law duress is not limited to

threats against the person. It may also consist of threats to business or property interestsIt has been held that one who falsely clouds the title to real property and then seeks some consideration to remove the cloud is guilty of a wrongful act and may be compelled to restore the consideration recovered by him.

The doctrine has also been sued to invalidate an agreement to pay an extra \$3,000 demanded by a tenant who had previously agreed to leave an apartment building about to be demolished by the defendant company²⁰¹ and in another case where a financial burden had been created to embarrass the plaintiffs and compel them to enter into an agreement, the court holding that acts furthering financial embarrassment while not unlawful were wrong in a moral sense and were capable of constituting duress.²⁰² These and other similar cases establish economic duress as much more than an extraordinary and limited remedy.²⁰³ Nonetheless it should be pointed out that several decisions have rejected the plea of economic duress.²⁰⁴ The leading case refusing to accept the plea is Fruhauf Southwest Garment Co. v. United States,²⁰⁵ where the plaintiff company claimed duress exerted by the U.S. Government in compelling the plaintiff to agree to a substantial reduction of the unit price of the subject of the transaction which the company agreed to because of financial difficulties. The court held that duress did not lie and attempted to summarize the applicability of the doctrine.

An examination of the cases, however, makes it clear that three elements are common to all situations where duress has been found to exist. These are (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; (3) that said circumstances were the result of coercive acts of the opposite party.....The assertion of duress must be proven to have been the result of the defendants conduct and not the plaintiff's necessities.

(iii) *Reflections of the doctrine of unconscionability in the common law.*

--Non Est Factum

The law of non est factum is basically the counterpart of the law of mistake with respect to the signing of documents but it approaches the doctrine of unconscionability in the rationale for its existence. Since Gallee v. Lee,²⁰⁶ it is limited to the protection of those who have signed documents where they have been incapable of reading or understanding the nature of the document so that consent to its contents is totally lacking or fraud is evidenced.²⁰⁷ To this extent, it is a more limited doctrine than the related concepts of duress and undue influence which it incorporates in some respects. However, Gallee v. Lee does not appear to have been completely accepted in Canada. In Commercial Credit Corporation v. Carroll Bros. Ltd.,²⁰⁸ the defendant owners of a farming corporation bought two tractors from a farm implements agent as a personal favour to him on the basis that he would finance the sale and keep up the monthly payments. The agent, after fraudulently filling in the sales documents sold the lien note to the plaintiff finance company who, after the agent's conviction for fraud, brought an action against the defendants on the lien note and sales contract. The court held that in spite of the restrictions placed by Gallee v. Lee on the scope of the doctrine of non est factum, it was applicable to the circumstances of the present case where the agent's fraud in substituting false details on the lien note and sales contract amounted to a misrepresentation of the class and character of the document. Moreover, the court went on to consider whether a "wise and experienced finance company" should be able to claim protection of the principle that where one of two innocent parties must sustain a loss caused by the acts of a third, he who has enabled the third person to occasion the loss, must sustain it.²⁰⁹ Tristschler C.J.Q.B. stated:

The finance company knows that the implement agent, armed with its forms, will be dealing with unsophisticated people who will place trust in him, that to such persons the implement agent is the logical person to consult on any problem arising out of a transaction and that it is reasonable for the farmer to take to the implement agent any communications which are puzzling or require explanation. The very nature of the relationship places a dishonest implement agent in a position where he

can take advantage of farmers. Great care on the part of finance companies is called for, but fierce competition between ever-multiplying credit-granting agencies and their desire to provide almost instant negotiability for dealers' paper leaves insufficient opportunity for verification of the facts of transactions. It will not do for plaintiff to say that it notifies a purchaser that the contract has been assigned and that payments due must be made to and future dealings had with it. Plaintiff knows that despite such notices farmers do continue to make payments to the agent and have dealings with him in relation to the assigned contracts and acquiesces in such conduct. The difficulties of finance companies are in a large measure of their own creation and a price to be paid for a faulty system - too much, and unnecessary speed and too little care.²¹⁰

--The Doctrine of Fundamental Breach

In certain respects the doctrine of fundamental breach is related more to the doctrine of unconscionability than it is to the regulation of deception. In many situations where liability for mis-statement is excluded or limited by a contractual disclaimer, a claim for immunity from liability amounts to a classic form of unconscionability.

While most of the cases involving the doctrine do not specifically ground it on the doctrine of unconscionability a recent English Court of Appeal decision has finally taken this step. In Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd.,²¹¹ a clause in a contract between a carrier and a forwarding agent limited liability in the case of the former, even in cases of negligence. The Court of Appeal gave effect to this clause simply by construing it as applicable on its terms to the situation in question. In the course of his judgment, however, Lord Denning said:

The time may come when this process of "construing" the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless?

Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago, "...there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused". It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.²¹²

(iv) The doctrine of unconscionability per se.

Relief against gross over-reaching is also potentially available through explicit applications of the equitable doctrine of unconscionability.²¹³ Unconscionability is an ancient doctrine. Equity for centuries has asserted the right to set aside transactions which are unconscionable. The locus classicus in this area is the judgment of Lord Hardwicke in Earl of Chesterfield v. Janssen²¹⁴ who in his list of categories of fraud in equity included the following:

It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other; which are unequitable and unconscientious bargains... [Another] kind of fraud is which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law; which is, that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.²¹⁵

Equity granted relief where it could be shown that one party took advantage of another's weaknesses such as, lunacy, mental weakness, drunkenness, dissoluteness, illness, age, eccentricity, illiteracy or extreme financial distress to exact unfair terms. Under the doctrine, it was necessary

for a party seeking to have a transaction set aside to show two things: first, that he was taken advantage of in the terms exacted, and, secondly, that because of one or more of the various infirmities or disadvantages he was not able to protect himself.

As to when contract terms will be regarded as unfair for these purposes, the statement of Lord Thurlow in Gwynne v. Heaton²¹⁶ is often cited:

To set aside a conveyance, there must be an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it.

This test is clearly little more than a judicial enshrinement of the concept of the "gut" reaction, and is reminiscent of Professor H.L.A. Hart's reformulation of Lord Devlin's test for when "immoral" conduct should be legally sanctioned: does the thought of it make the man on the Clapham omnibus feel sick?²¹⁷

Until recently, this lack of meaningful judicial definition of unconscionability has not been a major practical issue, because, despite magnanimous judicial formulations of the doctrine, it has only been applied to fairly narrowly circumscribed categories of "presumptive sillies"²¹⁸ and only then when the transaction was on the lunatic fringe of normal commercial dealings.

However, recent decisions by Canadian courts suggest that the doctrine is in the process of renaissance and revitalization, and is being given a more "mainstream" role in the policing of over-reaching in a modern bargaining contest. Thus, the question of what precisely does constitute unconscionability for the purposes of the general equitable doctrine has become a more live issue.

For example in Morrison v. Coast Finance Ltd.,²¹⁹ Davey J.A. of the B.C. Court of Appeal set aside a contract on the grounds that it was unconscionable in equity where a widow of 79 years and modest circumstances was persuaded to obtain a loan of \$4,800 from a finance company on the security of a first mortgage on her home in order to finance a car business that her boarder and a friend were starting and

where the finance company knew the reason for the loan. In the course of his judgment Davey J.A. said:

A plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker one. On such a claim, the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or duties of the weaker, which left him in the power of the stronger; and proof of substantial unfairness of the bargain obtained by the stronger.²²⁰

Similarly, in Waters v. Donnelly,²²¹ a "weak minded and very easily led" individual was relieved of an exchange of properties where the values exchanged were markedly disproportionate. In Gladu v. Edmonton Land Co.,²²² an illiterate, ignorant, half-breed North American Indian in financial distress who sold land at undervalue to a speculator was relieved of the bargain, and in Hrynyk v. Hrynyk,²²³ an "aged, ignorant and worn man" who transferred his land to his son for gross undervalue was granted rescission of the contract. In W.W. Distributors and Co. Ltd. v. Thorsteinssen,²²⁴ a girl who was high pressured by a door-to-door salesman into buying a large quantity of pots and pans at double their market value was granted rescission, ostensibly on the basis of misrepresentation rather than unconscionability, although the court was not especially concerned to identify any specific misrepresentation. On the other hand, illustrating the highly discretionary nature of this head of relief, the Manitoba Court of Appeal in Grieshammer v. Ungerer,²²⁵ refused to grant relief to a girl who committed half her year's salary to a series of dancing lessons, the girl's romantic infatuation with the dancing instructor rendering her particularly vulnerable to his contractual blandishments. Now, however, in a recent decision, Gaertner v. Fiesta Dance Studios Ltd.,²²⁶ the British Columbia Supreme Court held that one contract of several involving in all the sum of \$6,506 for dancing lessons, which had been induced by a series of hoaxes perpetrated by Fred Astaire Dance Studios (e.g. use of movie camera without film in to determine fitness for admission to the "Gold Key Club"), should be rescinded. While the case went off on the basis of fraud, it is clear from the tenor

of the judgment that the Court was influenced by the overall unfairness of the sales tactics used and the terms exacted. In another recent case, Paris v. Machnick,²²⁷ the Nova Scotia Supreme Court ordered relief, expressly under the equitable doctrine of unconscionability, where an illiterate and mentally slow woman sold her late husband's farm, established to be worth \$9,000 for \$2,500. The Court ordered the defendant to reconvey a portion of the land and pay an additional sum in cash for the balance. Relief was granted on similar reasoning in Knupp v. Bell,²²⁸ where a senile woman of no business experience who was easily led was induced to sell land to her neighbour at gross under-value; by the Alberta Supreme Court in Marshall v. Canada Permanent Trust Co.,²²⁹ where the applicant for relief was a 68 year-old man confined to hospital in poor physical and mental health who sold land at half its true value and by the Ontario Court of Appeal in Mundinger v. Mundinger,²³⁰ where a woman undergoing a serious nervous breakdown was induced by an overbearing husband to sign a separation agreement in which she agreed to transfer her joint interest in two substantial properties at consideration of \$5,000 and abandonment of all claims to further support.

The courts for the most part have been concerned with the application of the doctrine in circumstances where the party seeking relief can point to some specifically identifiable physical, mental or financial weakness which has been taken advantage of by the other party. As the decision in Greishammer indicates, many courts are not yet prepared to be satisfied simply with proof of a weakness on the part of one party consisting only of his grossly inferior business sophistication relative to the other party i.e. a rather less specific weakness than the traditional weaknesses, consisting in effect of an absence of worldlywiseness. In the modern marketplace, this form of weakness is one calling for much more frequent protection than the others which have traditionally engaged the concern of the courts.

American courts have been more responsive to this argument than their Anglo-Canadian counterparts. A recent case illustrates how the doctrine of unconscionability has been brought to bear in a situation which has frequently confronted English courts in the context of fundamental breach. In Henningsen v. Bloomfield Motors Inc. and Chrysler Inc.,²³¹ the plaintiffs, husband and wife, agreed to purchase a new 1965 Plymouth Sedan, made by Chrysler, from

Bloomfield Motors. The written agreement contained on its reverse side, inter alia, a new car warranty under which the manufacturer undertook to replace defective parts for 90 days or 4000 miles provided that examination by the manufacturer disclosed to its satisfaction that the parts were defective and provided that they were despatched by the buyer at his own expense to the manufacturer. This warranty was in lieu of all other warranties express or implied or other obligations on the manufacturer's part. Ten days and 468 miles after the purchase while the car was being driven by Mrs. Henningson, the steering system collapsed, the car ran off the road into a wall, Mrs. Henningson was injured, and the car destroyed.

One of the questions which arose in the case was whether on the basis of a contractual relationship between the manufacturer and both plaintiffs, the manufacturer could fall back on this clause in the agreement as excluding the normal implied warranty of merchantability in a contract of sale. The court held that this clause was void as being contrary to public policy.

In arriving at this view, the Court traced the historical development of judicial and legislative attitudes on the question of a consumer protection and emphasized an increasing judicial unwillingness to allow notions of freedom of contract to deprive a buyer of all rights. Judicial attitudes to wide exemption clauses and legislative developments in the field of implied terms were cited. The Court also pointed out that, on the particular facts in issue, nothing had been done (as was admitted) to draw the clause to the buyer's notice, and that even if this had been done, the buyer was most unlikely to have appreciated how much he was giving up under the existing law in return for so little. For example, on the terms of the contract, he was surrendering entirely any claim to damages for personal injuries arising out of defective manufacture, a claim which the implied term as to merchantability would normally protect. Finally, even if the clause had been drawn to the buyer's notice and even if he had understood its precise impact, the warranty was a uniform warranty promulgated by the Automobile Manufacturers' Association which included the "Big Three" controlling 86.72% of the market, and better terms, through lack of competition in this respect, were thus not available. The Court concluded:

In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. The judicial process had recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorises agreements between buyer and seller qualifying the warranty obligations. But quite obviously, the legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorise the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect, has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case..., we are of the opinion that Chrysler's attempted disclaimer of any implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.²³²

The explicitness of the Henningson attack on grossly unfair contractual provisions has now found a sympathetic and potentially highly significant parallel in a recent decision of the English Court of Appeal. In Lloyds Bank v. Bundy,²³³ the defendant, an elderly farmer, ill-versed in business affairs signed a series of guarantees and mortgages for his son's overdraft. In the final transaction, his son and the assistant manager of the bank visited the father to obtain his signature on a further guarantee that would have had the effect of mortgaging his sole asset - his cottage - to its total value. No independent advice was obtained by

the father who relied on his son's and more particularly the bank manager's advice regarding the advisability of this guarantee. Inevitably, the son's affairs grew worse and the bank insisted upon the sale of the father's cottage. In an appeal from the trial court's decision that the sale was a valid sale, it was held by the Court of Appeal that the bank was in breach of a fiduciary duty to ensure that the defendant formed an independent and informed judgment on the proposed transaction and therefore could not retain the benefit of the transaction. Lord Denning subsumed the various legal categories into which equitable relief falls e.g. duress, undue influence, breach of fiduciary duty, illegality and sought to apply a unifying principle to them. This unifying principle he found was inequality of bargaining power. He stated:

Gathering all [these categories] together, I would suggest that through these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one, who, without independent advice enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grossly impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the work 'undue', I do not mean to suggest that the principle depends on proof of any wrong-doing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other.²³⁴

In another recent decision by Denning L.J., inequality of bargaining power was again held to avoid a contract. In Clifford Davis Management Ltd. v. WEA Records Ltd.,²³⁵ two members of a pop group, unexperienced in business affairs and without legal advice signed a standard form agreement assigning to the plaintiff manager the copyright throughout the world in all their compositions for five years with an option to extend it to ten years. Moreover while one of the defendant songwriters agreed to deliver

a minimum of one musical composition a month to the plaintiffs, the plaintiffs gave no undertaking to publish any of the works. The plaintiffs and the group subsequently separated and the group was successful abroad. The issues decided in the case arose on appeal from an injunction granted the plaintiffs to restrain the infringement of copyright under the original agreement. In allowing the appeal, Lord Denning, relying on his own decision in Bundy and on the Schroeder case (earlier discussed) held that there was a prima facie case that the agreement between the two songwriters and the manager were unenforceable as the terms of the contract were manifestly unfair, the consideration was grossly inadequate and undue pressure was brought to bear. He concluded, in holding that the bargain was unconscionable, by stating "for these reasons, it may well be said that there was such inequality of bargaining power that the agreement should not be enforced...".²³⁶

Statutory Expressions of the Doctrine of Unconscionability. In certain circumstances, legislatures have expressly invoked the doctrine of unconscionability to regulate grossly unfair business practices. Generally in Canada and the U.K. there efforts have mainly involved credit transactions, and the regulation of interest rates.²³⁷ In the U.K., restrictions on interest sales were removed with the Usury Laws Repeal Act 1854. But, nearly 50 years later, the Moneylenders Act 1900 provided (s.1) that a court can reopen a money-lending contract (in either a commercial or consumer context) if the rate of interest or other charges are excessive "and the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief". If the court re-opens the transaction, it may relieve the borrower from excessive interest already paid, and set aside or modify any security given.²³⁸

The legislation has been followed in Canada in various provincial Unconscionable Transactions Relief Acts. These date back to the Ontario Money-lenders Act 1912, although in many other provinces they have been enacted only in the last decade or so.²³⁹

Doubts linger about the constitutionality of this legislation because of possible encroachment on the "interest" head of the Federal Parliament's jurisdiction, and while the

Supreme Court of Canada in Att.Gen. for Ontario v. Barfried Enterprises Ltd.,²⁴⁰ purported to uphold the validity of the legislation, the decision has been widely criticized. These doubts apart, after a slow start the legislation is now attracting a growing volume of case law.²⁴¹ This would seem to suggest that the legislation is meeting a real need. However, its scope is limited to money-lending transactions, and then only applies to the cost of credit and not other terms in such transactions. In some other jurisdictions, comparable legislation has been rather more widely cast. For example, the Australian Uniform Hire Purchase Acts contain a re-opening provision which permits a court to re-open hire-purchase transactions where the court concludes that any aspect of a transaction makes that transaction harsh and unconscionable. This provision has its origins in earlier Australian money-lending legislation based in turn on the U.K. Money-lenders Act of 1900. Unfortunately, because of the peculiarities of hire-purchase financing, especially the absence of any contractual relationship between the consumer and the dealer and generally the absence of an agency relationship between the dealer and the finance company, courts have been forced to exculpate finance companies where for example the hire-purchase price is grossly excessive, on the grounds that the unconscionability originated with the dealer and could not be attributed to the finance company, which had equally been prejudiced by it when buying the goods from the dealer before letting them out on hire-purchase.²⁴² This difficulty has been removed by s.46 of the South Australian Consumer Credit Act 1972 and s.24 of a companion Act, the Consumer Transaction Act 1972. The latter Act abolishes hire-purchase agreements for consumer purposes, thus forcing a contractual relationship between the consumer and the dealer either by way of a sale and a chattel mortgage back, or a sale and a mortgage from a third party financier. The former Act provides that any credit contract, mortgage or other security arrangement of a consumer character in which excessive credit charges are imposed or in which there are any other terms which are harsh and unconscionable, may be re-opened and avoided or modified by the Credit Tribunal, and administrative agency set up to administer both Acts.

The Quebec Consumer Protection Act 1971 (s.118) also contains an expanded re-opening provision which applies to all consumer credit transactions and to door-to-door sales. The section provides:

Every consumer whose inexperience has been exploited by a merchant may demand the nullity of the contract [as defined in s.1.(3)] or a reduction in his obligations if they are greatly disproportionate to those of the merchant.

As will be evident, the pattern in both Australia and Quebec, has been to widen usury concepts of unconscionable interest rates to other aspects of credit transactions and indeed to other classes of transactions altogether.

In contracts for the sale of goods in the U.S., for example, the doctrine of unconscionability was resurrected by the enactment of s.2-302 of the Uniform Commercial Code which provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect, to aid the court in making the determination.

This section first came into force in 1954 when Pennsylvania adopted the Code, and in spite of much controversy and academic attack²⁴³ is now in force in all but two state jurisdictions. This literary outpouring contrasts with the trickle of cases in which the section has been relied on, even as a subsidiary ground for a decision. Thus, to date, legal academics have been the principal beneficiaries of the section.

The Uniform Consumer Credit Code s.6-11 addresses

itself to unconscionability in credit transactions by providing

- (1) The Administrator may bring a court action to restrain a creditor or a person acting on his behalf from engaging in the course of
 - (a) making or enforcing unconscionable terms or provisions of consumer credit sales, consumer leases or consumer loans;
 - (b) fraudulent or unconscionable conduct in inducing debtors to enter into consumer credit sales, consumer leases or consumer loans.
 - (c) fraudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases or consumer loans.

In the U.K. Supply of Goods Act 1974 s.4., unconscionability is addressed in fact if not in name in the regulation of disclaimer clauses in sale of goods transactions:

- 55.--(1) Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negated or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract, but the foregoing provision shall have effect subject to the following provisions of this section.
- (2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.
 - (3) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 12 of this Act shall be void.

- (4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.
- (5) In determining for the purposes of subsection (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters--
 - (a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;
 - (b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;
 - (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;
 - (d) where the term exempts from all or any of the provisions of section 13, 14 or 15 of this Act if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with the condition would be practicable;
 - (e) whether the goods were manufactured,

processed or adapted to the special order of the buyer.

The importance of these recent attempts to regulate unconscionable transactions in broad terms lies in their recognition of the disparity of bargaining power in the consumer context and in developing measures for identifying and redressing this disparity.

The greatest problem in trying to legislate unconscionability is that it is by its very nature a highly open-textured concept. When defined very generally as in s.2-302 of the Uniform Commercial Code,²⁴⁴ it becomes little more than a statutory enactment of the equitable doctrine and thus adds little to a consumer's present rights. The U.S. Uniform Consumer Sales Practices Act have opted in the alternative to try to classify practices deemed unconscionable. The direction B.C. and Ontario have chosen is to draft a general prohibition against unconscionability and then to specify certain classes of conduct which are specifically prohibited. Alberta has not enacted a general prohibition but contents itself with a list of practices. In fact, Alberta, makes no conceptual distinction between deceptive and unconscionable practices and it is arguable that except for the sake of conceptual clarity and unless a remedial distinction is made between different practices,²⁴⁵ there is no need to classify separately deceptive and unconscionable acts.

The list of acts or practices deemed by statute to be unconscionable basically follows the existing case law. The doctrines of duress and undue influence are reflected in a prohibition against undue pressure and the taking advantage of one's inability to protect one's own interest.²⁴⁶ Unconscionability is reflected in the prohibition against grossly excessive price, one-sided contracts and a general prohibition against inequitable terms. All of these simply reflect Lord Denning's view in Lloyds Bank v. Bundy,²⁴⁷ that the law will not allow gross inequality of bargaining power to be exploited.

While the statutory prohibitions for the most part simply restate existing categories of unconscionability in equity, some additions have been made. Ontario has made it unconscionable to make a misleading statement of opinion on which the consumer is likely to rely to this detriment,²⁴⁸

conduct which at common law gave no right of action in misrepresentation. Alberta has provided that the following species of non-disclosure constitute unfair practices: entering into a consumer transaction where the supplier knew that the goods were defective or services would not be provided and the consumer was not or could not become aware of the defect or problems in delivery of services and the defect or failure to provide services substantially impairs the benefit anticipated under the transaction.²⁴⁹

The amendments to the Combines Investigation Act ignores the conceptual distinction between deceptive and unconscionable practices and make it an offence (now by virtue of s.3 1.1 giving a civil right of action) to conduct one's affairs in certain proscribed ways. Various of these prohibited classes of conduct would, if so defined, fall within what are considered unconscionable practices, e.g. bait and switch selling, pyramid selling, referral selling. It is submitted that the Federal government's route of non-characterization may be the most fruitful approach. While conceptually useful, the distinction between deceptive and unconscionable conduct is difficult to maintain in practice. Practically the most useful scheme of definition would appear to be a combination of the B.C. approach and the Federal approach which would take the form of prohibition against misleading, deceptive and unconscionable conduct and practices followed by a specific list of practices delineating the classes of conduct recognized as warranting explicit prohibition.

Consumer Access to Justice

Introduction. We have seen that existing substantive common law doctrines and statutory variations thereof hold out encouraging possibilities for coping with problems in the fields of misleading advertising and unfair trade practices. However, it scarcely needs remarking that the most benevolent legal doctrines are of no value to a consumer if he cannot get into court to take advantage of them. The present inaccessibility of the legal process to the consumer is too well documented now to allow dispute. David Caplowitz in his well-known study, The Poor Pay More, asked all interviewers: "Where would you now go for help if you were being cheated by a merchant or salesman?" Highlighting the degree of public alienation from the legal process, 64 per cent replied that they did not know.²⁵⁰ A

recent study of cases in the inferior courts of Toronto showed that only 22 consumer credit claims out of a total of 186 were disputed in actions brought in the city's county courts, and only 10 out of 110 in actions brought in the Small Claims Court.²⁵¹ In a recent survey done by the U.K. Consumer Council,²⁵² 40 per cent of the solicitors surveyed at random said they had no experience of consumer cases. Of 19 consumers surveyed who had taken their complaints to a solicitor, 10 reported that the solicitor had not taken up their cases at all, apparently on economic grounds. The Consumer Council states in its report, Justice out of Reach: "Universally, solicitors told us that consumer cases are a dead loss, financially -- whether court proceedings are involved or not. Many added some such phrases as, 'if we never saw another, we'd be happy' ... Solicitors almost to a man told us that they invariably advised clients against taking a disputed case to court. The main reason, of course, was economic ..."²⁵³ As Mr. Justice Douglas of the U.S. Supreme Court once remarked: "It takes no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars in order to get a thousand dollars ..."²⁵⁴

The Individual Suit. As the previous discussion noted, the present problems of access to the legal process are acute. The barrier to entry into the litigation system for individual consumers with small-scale consumer complaints are obvious. The expense, delays, inconvenience and unpleasantness involved generally outweigh the potential benefits of the individual action. A consumer's stake in his case is typically too small to warrant incurring these costs. In some circumstances the costs barrier may be partially cured through the development of appropriate class action mechanisms discussed below but most cases will not be appropriate for resolution by the use of the class action and the consumer must then face the barriers to the individual suit. In this context the major disincentive is a financial one. Various solutions have been offered in different jurisdictions and, in situations where the consumer does not have the resources to sue and the case involves issues of public concern, some jurisdictions have considered it appropriate to provide for the possibility of a civil action by a State official on behalf of the aggrieved consumer. Section 9(3) of the U.S. Uniform Consumer Sales Practices Act allows the Enforcing Authority to obtain civil relief on behalf of an individual who complains to his office. Both British Columbia and

Alberta have followed this precedent in their respective trade practices legislation allowing the Director to commence a substituted action in the name of and on behalf of the consumer where it is the public interest to do so.²⁵⁵

Saskatchewan, which is without comprehensive trade practices legislation, nonetheless has enacted a provision within their Department of Consumer Affairs Act 1972 giving the Attorney-General the right to bring a substituted action. By section 10 of the Act, the Attorney-General may commence and maintain an action on behalf of an individual or a class for damages, suffered by reason of contravention of the Act or any other act administered by the department or for breach of a contract for sale of goods or services.

The South Australian Prices Act Amendment Act 1970 has a similar provision. Under s. 18a(2) the Commissioner is empowered to institute proceedings on behalf of an individual consumer with respect to the enforcement of the Act or protection of the consumer in relation to any infringement or suspected infringement of any provision of the Act or other law relating to the interests of consumers.

New York City has a novel substituted action procedure under its Consumer Protection Law of 1969. Upon proof of a valid complaint by a consumer or consumers to the Commissioner of Consumer Affairs the commissioner has the power to bring an action to compel the defendants to pay into court, all property or money received by violation of the law and subsequently to refund such money or property and to pay the cost of to the consumer of the pursuing complaint as well as compelling the defendant to pay the cost of the investigation leading to the judgment.

The recent U.S. Federal Trade Commission Improvement Act also provides for extensive substituted civil actions by the Commission on behalf of aggrieved consumers.

The advantages of the substituted action are self-evident. The resources of the state are at the disposal of the consumer, his costs are covered and cases which may not normally have been litigated or appealed will be where the public interest requires this.

A more novel solution which helps overcome the financial disincentive of litigating a small claim and creates

in its stead a financial incentive is the concept of a minimum recovery. Section 11(b) of the U.S. Uniform Consumer Sales Practices Act allows a consumer who has incurred damages as a result of a prohibited practice to recover actual damages or \$100 whichever is greater in order, as the comment to the section notes, "to make an individual damage remedy meaningful".

Another means of eliminating some of the disincentives involves the development of legal aid machinery for small consumer claims. The present position with respect to legal aid in the Canadian provinces is not entirely satisfactory.²⁵⁶ Legal aid is not generally available in small claims courts and none of the trade practices Acts have attempted to resolve the problem of costs and financial barriers to bringing suit under the Acts.

Australia has attempted to address the problem in section 170 of the Australian Trade Practices Act which allows a person bringing an action for contravention of the Act to apply to the Attorney-General for a grant of assistance. While this may not provide a specific incentive to sue, at the very least, the provision eliminates one of the most compelling disincentives.

The Class Action. The class action was noted above as a means of overcoming some of the present disincentives to the bringing of an individual suit in situations where the consumers stake in an action is too small to warrant individually litigating his complaint. However, class actions accomplish more than simply enabling small claimants to achieve redress. The opposite side to redress is the prevention of unjust enrichment on the part of the supplier.

The barriers to entry into the litigation system for individual consumers with typical small-scale, consumer complaints are obvious: the expense, delays, inconvenience and unpleasantness involved generally outweigh the potential benefits of bringing an individual action. A consumer's stake in his case is typically too small to warrant incurring these costs. The same problem arises more obviously in other consumer contexts. For example, a public utility will have a very concentrated stake in pressing a multi-million dollar rate increase application before a regulatory body. But an individual consumer who stands to have his telephone bill increased by, say, 20 cents a month has far too small a stake

in the regulatory outcome to press his case as strenuously, if at all, although collectively, consumers of the utility's services stand to be prejudiced by exactly the same amount as the utility stands to be benefitted. Similarly, a supplier may stand to obtain substantial rewards from a multi-million dollar promotion that involves misrepresentation, although the impact of the misrepresentation on individual consumers will be such that the misrepresentation will go unredressed by them. In both cases, collective forms of representation are the only rational ways of ensuring that the stakes outweigh the representational overheads. In a mass production, mass marketing, mass consumption society, custom-made, individually tailored law suits for consumers are often as much an anachronism as the concept that all cars that are put on the market should be handcrafted. In both cases, massive inefficiencies and misallocation of resources are liable to be generated. Unfortunately, in the former case, that is the present reality. Just as economies of scale dictate mass production for suppliers, so do economies of scale now dictate mass redress procedures for consumers prejudiced by a common legal wrong.

Very few consumer class actions have been brought in Canada.²⁵⁷ The case law interpretations of the Rule of Practice which allows class actions²⁵⁸ strictly limit the situations in which a representative suit can be brought. The requirement that a class have a "common interest"²⁵⁹ which has been interpreted to exclude actions where damages must be separately assessed or where separate contracts are involved²⁶⁰ as well as the hurdle presented by the structure of costs and the difficulty in acquiring a legal aid certificate for group actions²⁶¹ in their combined effect leave little scope for the development of consumer class actions in Canada within the existing rules.

Only one of the provincial trade practices Acts has attempted to remedy the situation by enacting a class action provision within the statute. Section 16(2) of the B.C. Trade Practices Act allows an individual to sue on "behalf of consumers generally or on behalf of a designated class of consumers" for an injunction and ancillary to the order for an injunction restitution of property is allowed. While this provision is a welcome initiative, clearly it does not fully meet the deficiencies of the present system. In the first place, without express provision to the contrary, the "common interest" problem still applies and except for the fact that

the Act specifically recognizes the existence of the class action device, it does nothing to remedy existing constraints such as the costs rules.

Secondly, the provision contemplates a class action only for an injunction and ancillary to this an order only for restitution. In contrast, The Uniform Consumer Sales Practice Act, via s. 11(d) allows a consumer class action for the "actual damages" caused by an act or practice which violates the Act. However, the U.S. Act allows a defence by the supplier of a bona fide error whereby damages per se are not recoverable and relief is limited to the amount by which the supplier was unjustly enriched by his violation.

Given the potential of the class action for maximizing efficiency, compensation and deterrence in the consumer context,²⁶² it is submitted that as far as possible classes of consumers be given the same rights of action as the individual consumer notwithstanding that the claim is for damages or that separate contracts exist. Thus, where individual damages are claimed and must be proved or where separate contracts exist, the common question may still be most efficiently resolved by a class action and the separate issues dealt with more expediently and efficiently after the common issue is settled.

While the enactment of class action provisions goes part way towards solving the incentive problems noted in the preceding discussion, many disincentives, particularly financial, still exist. The incentive to sue problem is particularly acute in the consumer class action situation where one or more individuals may risk financial ruin if the case is lost and may stand to lose substantial amounts in costs even in the event of a successful action. This raises the question of how to eliminate the financial disincentives in bringing such an action. Unless this issue can be resolved, all the other changes to class action rules are likely to prove largely futile.

Various solutions have been posed. The substituted class action is one response to the problem. Section 10 of the Saskatchewan Dept. of Consumer Affairs Act has been mentioned as one example. Section 9(b) of the U.S. Uniform Consumer Sales Practices Act allows the Enforcing Authority to bring a class action on behalf of consumers for actual damages caused by the prohibited conduct. B.C. has enacted

a similar provision under section 16(2) of the B.C. Trade Practices Act. The Director is empowered to sue on behalf of a class of consumers for declaratory and injunctive relief and ancillary to a court order for this relief an order for restitution may be made.

Another solution involves the enactment of a provision allowing grants of assistance to consumers contemplating class actions. It is submitted that there is no reason to restrict the Australian concept of legal aid availability provided within the statute to individual claims. A person suing on behalf of a class risks a great deal more in costs than an individual and may stand to gain much less. Moreover, given our preference for class actions where feasible it seems as necessary to eliminate the disincentives in this type of action as it is in the individual claim.

A less satisfactory alternative, but one, which in the absence of legal aid, seems necessary is the enactment of a one-way costs rule for class actions whereby the class if successful may ask for and receive complete indemnification of costs (on a solicitor and client basis) from the other side whereas in the event of an unsuccessful action bears only the costs of its action and not the costs of the other side.

The Report of the Ontario Task Force on Legal Aid looked at the problem that costs pose in the context of group actions and concluded that it is in the public interest to ensure that groups demonstrating a bona fide concern for matters affecting the public interest will not be penalized in costs if these efforts are unsuccessful. They therefore recommend a qualified one-way costs rule whereby the burden is placed upon a successful defendant to satisfy the court that no public issue of substance was involved or that proceedings were frivolous or vexatious before his costs can be recovered from the plaintiff class.²⁶³ We concur in these recommendations but would emphasize, as the Task Force did, the importance of making available legal aid for class actions so that the class's own legal costs are not a deterrent to suit.

A recent English Court of Appeal case had addressed the problem of financial disincentives to representative litigation. In Wallersteiner v. Moir,²⁶⁴ a minority shareholder brought an action on behalf of himself and other share-

holders against a director for fraud, misfeasance and breach of trust. The case had been going on for over 10 years, the plaintiff's resources were completely exhausted and litigation was continuing. Moreover, if the action were successful, he could not recover his losses from the damages awarded as these would accrue to the company. The court recognized that it termed "a serious defect in the administration of justice" and examined the possible means of protecting a man in the plaintiff's position: (1) an indemnity from the company (2) legal aid and (3) contingency fees for the plaintiff's lawyers. The court recognized the reality that the plaintiff was suing, not on his own behalf but on behalf of the company and "on the plainest principles of equity" win or lose would allow indemnification from the company. Legal aid was not available precisely because the plaintiff was in reality suing on behalf of a company, though in appearance he was suing on his own behalf.

Lord Enning went on to consider the appropriateness of contingency fees, the status of contingency fees in North America and the policy in England. He concluded "the general rule is, and should remain in England, that a contingency fee is unlawful as being contrary to public policy".²⁶⁵ However, he went on to consider the question of exceptions to the general rule and found strong arguments for making an exception in cases of derivative (i.e. class) actions. He stated:

Let me take a typical case. Suppose there is good ground for thinking that those in control of a company have been plundering its assets for their own benefit. They should be brought to book. But how is it to be done and by whom? By raising it at a meeting of shareholders? Only to be voted down. By reporting it to the Board of Trade? Only to be put off, as Mr. Moir was. At present there is nothing effective except an action by a minority shareholder. But can a minority shareholder be really expected to take it? He has nothing to gain, but much to lose. He feels strongly that a wrong has been done--and that it should be righted. But he does not feel able to undertake it himself. Faced with an estimate of the costs, he will say: 'I'm not going to throw away good money after bad.' Some wrongdoers know this and take advantage of it. They loot the company's funds knowing there is

little risk of an action being brought against them.

What then is to be done? The remedy, as I see it, is to do as is done in the United States--to permit a solicitor to conduct a derivative action on the basis of a contingency fee. It should be subject to proper safeguards. The action should not be started except on an opinion by leading counsel that it is a reasonable action to bring in the interests of the company. The fee should be a generous sum--by a percentage or otherwise--so as to recompense the solicitor for his work--and also for the risk that he takes of getting nothing if he loses. The other side should be notified of it from the very beginning: and it should be subject to the approval of The Law Society and of the courts. With these safeguards I think that public policy should favour a contingency fee in derivative actions--for otherwise, in many cases, justice will not be done--and wrongdoers will get away with their spoils.²⁶⁶

The rationale behind this conclusion applied equally to consumer class actions. In such cases, the individual suing on behalf of a class has very little to gain and much to lose and in these cases many wrongs will go unredressed unless some incentive to sue is created. One such incentive is the creation of a provision allowing contingency fees in class actions, subject to proper safeguards.

While clearly a class action mechanism and ancillary support for it is needed, the potential utility of class actions in a trade practice context should not be overstated. The usefulness of class actions here is likely to be limited by requirements of proof of reliance by each consumer on the representation of the supplier.

Detailed reforms in this area of class actions are being considered in another paper²⁶⁷ and are outside the scope of this discussion. Nonetheless, the next chapter proposes some procedures for mass redress as ancillary features of the criminal and administrative sanctions.

Conclusion And Proposals For Reform Of Private Law Remedies

The discussion in this chapter has served to emphasize that, for the most part, the common law has the means and the flexibility, if applied intelligently and imaginatively, to afford redress to a consumer in most cases of deception or unconscionability. Thus, statutory reform in this area is principally a question of clarifying, codifying and refining the present common law position.

The first priority in the regulation of deception and unconscionability is, therefore, a formulation of prohibited conduct corresponding to and incorporating the common law of terms and representations, equitable concepts of relief, and the present statutory requirements and rationalizations of these rules. A proposed list of prohibited practices, presented in the next chapter, is advanced as the basis of criminal, administrative and civil sanctions in this area.

The remedies available in a civil action for commission of a prohibited practice have been a major concern of this particular chapter. As we noted in the discussion of this question, the common law position has been rendered confused and uncertain by the over-categorization of the substantive law. The proposal for a list of practices making no differentiation between the types of conduct will partially solve this confusion. However, as we noted in the discussion of legislative initiatives which have proceeded on this basis, residual confusion remains in some cases through a differentiation of the types of remedies available for different practices. The critical importance of reducing procedural impediments to effective private law redress was also underscored.

Thus, based on the analysis of the present status of a consumer's rights in relation to unfair trade practices, the proposals here advanced represent an attempt to resolve the confusion, uncertainty and inconsistency in the present law by formulating a coherent set of private law remedies, which, together with the procedural reforms advocated in the next chapter, are intended to provide consumers with effective civil access to justice.

Proposals for Reform of Consumer Remedies. In our previous discussion of rescission, various alternatives were discussed and in the final analysis, it was determined that

the present context demanded that the consumer's right to rescission be absolute. While an absolute right to rescission is the most efficient means of securing redress in that it is partly self-executing, certain difficulties in its application must be overcome. In some cases the consumer will be rescinding against a retailer for the representation of a manufacturer. Therefore, the retailer should in these cases have a right to vouch over against the manufacturer (i.e. bring him into any action) or claim damages by way of indemnity from the representor. Where the manufacturer or representor is a foreign firm, the importer-distributor should be deemed the responsible party in these circumstances.

In respect of damages, the major requirement of a statutory provision is that it be clear and unambiguous as to what damages are recoverable. Similarly with residual relief, the powers of the court to grant alternative orders should be spelt out clearly.

Thus, the following provisions are proposed:

1. Any agreement, whether written, oral or implied, that has been subject of a prescribed act or practice may be rescinded by the consumer against the supplier.
2. Where the supplier who has engaged in the act or practice which is the ground for rescission is someone other than the party against whom the consumer is rescinding, the party against whom the claim for rescission is made, may join the supplier in any action for rescission and in any event claim damages against the supplier in the amount of his loss.
3. Where the supplier who has committed the act or practice which is the ground for rescission under section 1 has no place of business in Canada, the importer of the product or service which is the subject of rescission shall be deemed the supplier for purposes of sections 1 and 2.
- 4(a) In addition to or instead of rescission, the consumer who has entered an agreement

which has been the subject of a proscribed act or practice may claim compensation, including restitution, loss occasioned by reliance upon the agreement, loss occasioned to the expectations reasonably created by the agreement and any other damages including damages for loss of enjoyment and inconvenience.

- (b) Where in the circumstances the court considers it appropriate, the court may award punitive damages in addition to those damages given in section 4(a).
- (c) Except in a class action, the amount of recovery under sections (a) and (b) shall be not less than \$100.

Section 4(c) limits the minimum recovery concept to individual claims only. If the provision applied to class actions as well, over-deterrence and over-compensation could result.

- 5. In any claim by a consumer for relief under this Act; in addition to or instead of rescission, restitution or damages, the court may order any other relief which it deems just and equitable.

This residual provision would have particular application to unconscionable practices where the relief required will often be some modification to oppressive terms in an agreement e.g. security provisions, rather than termination or compensation.²⁶⁸

Proposals for Reform of Ancillary Matters.

(i) *The parol evidence rule.* While not crucial to the availability of redress for deceptive practice because of the proposed definition of the prohibited practices, a section specifically dealing with the parol evidence rule is useful for the sake of certainty and would have the effect of enlarging the consumer's right to bring in extrinsic evidence of circumstances surrounding the transaction, which may be particularly relevant in cases of unconscionability. The following provision is proposed:

In any proceeding in respect of a consumer transaction, no rule of law respecting the admissibility of parol or extrinsic evidence shall operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or a particular term or provision of the consumer transaction, or relating to the general circumstances of the transaction.²⁶⁹

(ii) *The doctrine of privity.* The problems privity poses may be solved quite simply by redefining "consumer" and "supplier". The definition of consumer must include those hitherto barred from asserting rights under a contract by the absence of a contractual nexus between that persona and the supplier. Thus problems of horizontal privity are resolved by the following definition of "consumer":

'consumer' means an individual, other than a supplier, who participates in, takes the benefit of, incurs the detriment of or is otherwise affected by a consumer transaction and includes the donee, guarantor or assignee of that individual.²⁷⁰

Problems of vertical privity are overcome by the following definition of "supplier":

'supplier' means a person, other than a consumer, who in the course of his business solicits, offers, advertises, or promotes the disposition on the supply of the subject of a consumer transaction, or who engages in, enforces or otherwise participates in a consumer transaction, whether or not any privity of contract exists between that person and the consumer and includes the successor to, and assignee of any right or obligations of the supplier.²⁷¹

As we noted earlier, it may be advisable to place some qualification on the liability of an assignee if the assignee now assumes the status of "supplier" for the purposes of this proposed Act. We recommended that the Ontario practice be adopted thus limiting the liability of an assignee to the amount received by the assignee under the agreement.

(iii) *Disclaimer clauses.* It is recommended that attempts to contract out of the provisions of the Act or to limit liabilities arising under the Act be made void in a provision drafted along the following lines:

Any term of a contract for the supply of goods or services to a consumer under a consumer transaction covered by this Act that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying the rights conferred by this Act or the liabilities arising from contravention of the provisions of this Act is void.²⁷²

Proposals for Reform of Civil Access

(i) *The substituted action.* We propose a substituted action provision as follows:

Where the Director is satisfied that a consumer or class of consumers has a cause of action, or a good defence to an action, grounds for setting aside a default judgment, or grounds for an appeal or to contest an appeal and that it is in the public interest or proper to do so, he may, on behalf of and in the name of the consumer, or class of consumers, institute proceedings against the supplier or defend any proceedings brought against the consumer by a supplier.²⁷³

(ii) *A minimum recovery provision.* We propose that a provision similar to s.11(b) of the U.S. Uniform Consumer Sales Protection Act be incorporated in the Act. Such a provision would allow the individual to recover his actual loss or damages or a minimum amount (\$100) whichever is greater in any suit brought for violation of the Act except a suit brought by way of a class action. This proposal is designed to provide a modest incentive for an individual consumer to sue in respect of violations of the Act.

(iii) *Class action reform.* Specific and detailed reforms in the area of class actions are outside the mandate of this paper. However, certain proposals for costs reform in class actions are proposed.

(iv) *Mass redress procedures.* Further reforms for civil access are proposed in the next chapter. There, mass redress procedures are outlined as an ancillary feature of the proposed criminal and administrative sanctions.

(v) *Legal aid provisions.* It is submitted that legal aid should be made available to any class or individual who institutes or defends proceedings under the Act where the public interest so dictates.

Taking the concept from s. 170 of the Australian Trade Practices Act, the following provision is proposed:

An individual consumer or class of consumers who has instituted, proposes to institute a proceeding against a supplier under this Act or who is defending a proceeding under the Act, may apply to the Attorney-General for a grant of assistance in respect of the proceeding.

(vi) *Cost reform.* The next chapter proposes certain modifications in the present costs structure.

Conclusion. This chapter has directed itself to the special problems of private law redress by consumers for unfair trade practices. The thrust of the analysis has been that the present substantive law is generally adequate to protect the consumer civilly and reform in this area involves codification and refinement rather than any sweeping overhaul of present substantive rights. The remedies situation is somewhat less satisfactory and proposals were developed to meet the present shortcomings. Thus, having formulated a coherent set of rights and remedies, consumer access to the legal system becomes of paramount importance. The present status of consumer access to justice and some tentative statutory reforms were reviewed. However, as is obvious from the discussion and the proposals, civil access to the legal system involves legal, financial and psychological constraints which may not be capable of significant reform in isolation from other methods of law enforcement. Thus in the concluding chapter, we turn to the issues of access and enforcement in the context of an integrated framework of criminal, administrative and civil sanctions designed to achieve an optimal mix of the objectives of compensation, deterrence and efficiency in a trade practices context.

IV. Footnotes

- 1 See e.g. Trebilcock, "Private Law Remedies for Misleading Advertising" University of Toronto Law Journal, Vol. XXII, No. 1, 1972, 1.
- 2 See for example, Swan, "Misleading Advertising: Its Control" Alberta Law Review Vol. IX, No. 2, 1971, 310; Alyluia, "The Regulation of Commercial Advertising in Canada" Manitoba Law Journal, Vol. 5, No. 1, 1972, 103; O'Connor, Deceptive Advertising, (a thesis submitted for the Degree of Master of Laws, University of Melbourne, 1972.)
- 3 S.B.C. 1974 s.96 as amended.
- 4 S.A. 1975 (Bill 21).
- 5 S.O. 1974 c. 131.
- 6 See Harris v. Nickerson, (1873) 8 Q.B. 286; Spencer v. Harding (1870) L.R. 5 C.P. 561; Grainger v. Gough [1896] A.C. 325; Rooke v. Dawson [1895] 1 Ch. 480; and more recently Pharmaceutical Society of Great Britain v. Boots Cash Chemists [1952] 2 A.B. 795; Patridge v. Crittenden [1968] 2 All E.R. 421; Fisher v. Bell [1961] 1 Q.B. 394, and the Canadian decision accepting Boots and Fisher v. Bell, R. v. Bermuda Holdings (1969) 9 D.L.R. (3d) 595 (B.C.).
- 7 Scott v. Hanson (1829) 1 Russ. & M. 128; Dimmock v. Hallet (1866) 2 Ch. App. 21; Magennis v. Pallon (1828) 2 Mol. 561.
- 8 Cheshire and Fifoot, Law of Contracts, (1966) (Aust. Ed., Higgins and Starke) at 360.
- 9 O'Connor, op.cit., Note 2.
- 10 Trebilcock, op.cit., Note 1, passim.
- 11 [1970] 1 O.R. 125.
- 12 [1964] A.C. 30.
- 13 (1966) 53 D.L.R. (2d) 630, (Sask. Q.B.).

- 14 At 637, 638.
- 15 (1970), 10 D.L.R. (3d) 395 (Ont. H.C.).
- 16 At 405.
- 17 [1971] 5 W.W.R., 409; 4 C.C.C. (2d) 423, affirming
16 D.L.R. (3d) 470; 2 C.C.C. (2d) 533; 64 C.P.R. 3;
(Alta, C.A.).
- 18 The distinction between conditions and warranties has
been frequently criticised. Most recently the Ontario
Law Reform Commission recommended that the distinction
be eliminated for precisely these reasons i.e. the
distinction focuses on an a priori classification of
the obligation rather than on the severity of the breach
of the obligation. Moreover, it should be noted that
U.S. sales law has never adopted the distinction and
has not appeared to have suffered unduly.
- 19 (1861) 10 C.B.N.C. 844.
- 20 [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769 (H.L.).
- 21 [1901] 2 K.B. 215.
- 22 See R. v. Imperial Tobacco, supra. p. 199.
- 23 One of the Canadian provinces has amended its Consumer
Protection Act to deal with precisely this problem.
The Manitoba Consumer Protection Act s. 58(8) R.S.M.,
1970, C.C. 200 as amended by Stat. Man. 1971., c.36 s.8
reads as follows: "Every claim by a seller regarding
the quality, condition, quantity, performance or effi-
cacy of goods or services that is (a) contained in an
advertisement or (b) made to a buyer shall be deemed to
be an express warranty respecting those goods or
services." Moreover, the Ontario Law Reform Commission,
Report of Consumer Warranties and Guarantees in the
Sale of Goods, Department of Justice 1972, recommended
the elimination of this distinction between contractual
and non-contractual representations and the adoption of
the test used in s.12 of the American Uniform Sales Act
which provides that: "Any affirmation of fact or any
promise by the seller relating to the goods is an ex-
press warranty if the natural tendency of such affirma-

tion or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

- 24 Prather v. King Resources Co. (1973) 33 D.L.R. (3d)
112 (Alta. S.C.).
- 25 [1957] 1 W.L.R. 370; 101 S.J. 186; 1 All E.R. 325 (C.A.).
- 26 [1965] 1 W.L.R. 623; 2 All E.R., 65 (C.A.).
- 27 (1967) 41 A.L.J. 293.
- 28 See pp. 242-260 infra on the doctrine of unconscionability.
- 30 See Bell v. Lever Bros. Ltd, [1932] A.C. 161.
- 31 [1913] 3 K.B. 564; 83 L.J.K.B. 40; 109 L.T. 526.
- 32 (1964) 45 D.L.R. (2d) 472.
- 33 (1969), 81 West's Calif. Rep. 519 (Calif. C.A.).
- 34 [1970] 1 O.R. 125.
- 35 (1964) 45 D.L.R. (2d) 472.
- 36 (1871) L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329;
19 co. R. 1059.
- 37 Ibid.
- 38 (1974) 44 D.L.R. (3d) 82 (Fed. Ct.).
- 39 (1972) 21 D.L.R. (3d) 66 (B.C.S.C.).
- 40 (1974) 38 D.L.R. (3d) 759 (B.C.S.C.).
- 41 See also Royal Bank of Canada v. Hale (1962) 30 D.L.R.
(2d) 138 (B.C.S.C.). contra Hawrish v. Bank of Montreal
(1969) 2 D.L.R. (3d) 600 (S.C.C.) noted Waddams (1969)
47 Can. B.R. 505.
- 42 (1972) 25 D.L.R. (3d) 581 (B.C.S.C.) reversed on other
grounds (1973) 35 D.L.R. (3d) 613 (B.C.C.A.).

- 43 (1973) 42 D.L.R. (3d) 242.
- 44 (1974) 49 D.L.R. (3d) 641; A recent English decision has allowed concurrent tort and contract actions. See Esso v. Marden [1975], All E.R. 203 (Q.B.).
- 45 Non-disclosure is not always actionable as misrepresentation. In Saskatoon Sand & Gravel v. Steve (1973) 40 D.L.R. (3d) 248 a contract for removal of the gravel from the defendant's land was interpreted incorrectly by the defendant. The court held that in spite of his knowledge of the misinterpretation, the plaintiff owed no duty to inform the defendant of the fact.
- 46 [1932] A.C. 562.
- 47 S.C.M. v. W.J. Whittal and Son Ltd. [1971] 1 Q.B. 337 and Spartan Steel and Alloys Ltd. v. Martin and Co. Ltd. [1972] 3 W.L.R. 502 for example.
- 48 (1972) 40 D.L.R. (3d) 530.
- 49 See Waddams (1974) 52 Can. B.R. 96.
- 50 (1971) 25 D.L.R. (3d) 121.
- 51 Section 2(3)(r).
- 52 Section 2(a) (xiii).
- 53 S. 41(1)(d).
- 54 s.36(1)(a).
- 55 S. 52(1).
- 56 The latter part of the chapter dealing with remedies discusses the attempts to abolish the distinction between conditions and warranties. It seems more appropriate to deal with the problem in the context of remedies as the concern with terms tends to focus on the remedial distinctions more than the conceptual differences.
- 57 See British Columbia, Trade Practices Act, s. 2, Ontario Business Practices Act, s. 2, Alberta Unfair Trade Trade Practices Act, s.4.

- 58 Australia Trade Practices Act, 1974, s. 52(1) .
- 59 Bill C-2, s. 36(1) .
- 60 See pp. 204-206 infra.
- 61 Section 2(1)(a) and section 3(3)(r) .
- 62 Section 2(a)(xiii) .
- 63 Section 4(1)(c) .
- 64 (1972) 26 D.L.R. (3d) 699 .
- 65 Ibid, at 727-8 .
- 66 (1974) 51 D.L.R. (3d) 702 .
- 67 See Fines Flowers, supra .
- 68 Op.cit., Note 64 .
- 69 B.C. Trade Practices Act, 2(2) .
- 70 [1962] 2 Q.B. 26 .
- 71 The discussion in this section draws heavily upon the analysis of contract damages in Fuller and Perdue, "The Reliance Interest in Contract Damages", (1963) 46 Yale L.J. 54 .
- 72 (1854) 9 Ex. 341; 156 All E.R. 145 .
- 73 (1875) L.R. 10 Q.B. 111 .
- 74 at 116 .
- 75 [1950] 2 All E.R. 1167 (K.B.) .
- 76 [1973] 1 All E.R. 71 (C.A.) .
- 77 at 74 .
- 78 [1975] 3 All E.R. 92 .
- 79 (1880) 16 Ch. D. 290 .

- 80 [1974] 3 W.W.R. 406 (Man. Co. Ct.).
- 81 Athens-Macdonald Travel Service Pty. Ltd. v. Kazis,
[1970] S.A.S.R. 264 (Sup. Ct. S.A.).
- 82 See for example, O.L.R.C. Report on Consumer Warranties
and Guarantees in the Sale of Goods, Dept. of Justice
1972.
- 83 Dept. of Justice 1972.
- 84 See p. 210 infra on this common law development in
remedies for conditions and warranties.
- 85 See for example Scythes & Co. v. Dods Knitting Co. (1922)
52 O.L.R. 475 (App. Div.) which determined the seller's
right to cure a breach of contract by retendering goods
corresponding to the contract specifications.
- 86 The Act has been the subject of extensive criticism
focusing in part on this provision. See Atiyah and
Treitel, "Misrepresentation Act 1967" (1967) 30 M.L.R.
369.
- 87 Two recent English cases have attempted to solve the
harshness of the law in a similar manner. See L. Schuler
A.G. v. Wickman Machine Tool Sales Ltd. [1974] A.C. 235.
(H.L.) and Cehave v. Bremer (1975 C.A. as yet unreported).
- 88 The Ontario approach creates no remedial distinction be-
tween the types of prohibited conduct except to allow
exemplary damages only for those practices classified
as unconscionable.
- 89 Section 3(3).
- 90 Alberta, Unfair Trade Practices Act, s. 11(2)(d)(iii);
B.C. Trade Practices Act, s. 20(2) and s. 21.
- 91 Alberta, Unfair Trade Practices Act, s. 11(2)(b); B.C.
Trade Practices Act, s. 20(1); Ontario, Business
Practices Act, s. 4(1)(a).
- 92 Section 31.1(1).
- 93 Section 82(1).

- 94 See p.p. 265, 266 infra.
- 95 See section 31.1.
- 96 See section 82.
- 97 The disclaimer clause problem has attracted a large body of academic comment. For an analysis of Canadian developments, see Cumming, "The Judicial Treatment of Disclaimer Clauses in Sale of Goods Transactions in Canada" (1972) 10 Osgoode Hall L.J. 281.
- 98 L'Estrange v. Graucob [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; [1934] All E.R. Rep. 16; commented upon in Spencer, (1973) Camb. L.J. 104.
- 99 [1956] 1 W.L.R. 936.
- 100 Suisse Atlantique d'Armement Maritime S.A. v. N.V. Rottendamsche Kolen Centrale [1967] A.C. 361 (H.L.).
- 101 See Knowles v. Anchorage Holdings Co. Ltd. (1964) 43 D.L.R. (2d) 300 (B.C.S.C.) Western Tractor Ltd. v. Dyck (1970) 7 D.L.R. (3d) 535 (Sask. C.A.); Lightburn v. Belmont Sales Ltd. (1969) 6 D.L.R. (3d) 692 (B.C.S.C.) and Gibsons v. Trapp Motors Ltd. (1970) 9 D.L.R. (3d) 742 (B.C.S.C.) which totally ignored Suisse. For a detailed review of recent Canadian cases, see P.A. Cumming, op.cit., Note 97; S.M. Waddams, (1971) 49 Can. B.R. 579 and P.A. Field, (1971) 6 U.B.C.L.R. 405.
- 102 Farnsworth Finance Facilities Ltd. v. Attryde [1970] 1 W.L.R. 1053 (C.A.).
- 103 Trebilcock, M.J. "Protecting Consumers Against Purchases of Defective Merchandise" (1971) 4 Adelaide L. Rev. 12, at 24.
- 104 For a detailed analysis of the shortcomings of the doctrine of fundamental breach, see Trebilcock, ibid.
- 105 [1970] 2 W.L.R. 198 (C.A.). The case has received much comment and criticism. See Leigh-Jone and Pickering, "Fundamental Breach, the Aftermath of Harbutt's Plasticine" (1971) 87 L.Q. Rev. 515; Wilson, "Funda-

- mental Breach: The Plot Thickens" (1971) 4 N.Z.U.L. Rev. 254 and case comments in (1970) 28 Camb. L.J. 189, 33 M.L. Rev. 441 (1971) 4 N.Z.U.L. Rev. 300; (1970).
- 106 The Farm Implements Act, R.S.A., c.136, as am.; The Agricultural Implements Act, 1968 Stat. Sask., 1968 c.1.; The Farm Machinery and Equipment Act, Stat. Man, 1971, c.83 as am; The Farm Implement Act. Stat. P.E.I. 1968 c. 49.
- 107 The Conditional Sales Act, R.S.S 1965 c.393 s.25.
- 108 The Consumer Protection Act, R.S.M. 1970 c.c. 200 as am. s.58.
- 109 The Sale of Goods Act, S.B.C. 1971 c.52 as am. s.21A.
- 110 The Consumer Protection Act, 1971 S.O. c.24 s.2.
- 111 See B.C. Trade Practices Act, s.28: Alberta Unfair Trade Practices Act, s.19(1); Ontario Business Practices Act s.4(8).
- 112 s. 68.
- 113 Legal and Managerial Problems in Implementing the Consumer Aspects of the Combines Amendment Bill; Conference on Implications of the New Competition Act, York University, Jan. 25, 1974.
- 114 For a more detailed analysis of the parol evidence rule and case law thereunder, see in particular Robert Forbes, The Parol Evidence Rule, With Particular Reference to Sales Transactions, O.L.R.C. Sale of Goods Project, March 1975; D.W. McLauchlin, "Admissibility of Parol Evidence to Interpret Written Contracts" (1974) 6, N.Z.U.L. Rev. 121; Spencer, "Signature and Consent and The Rule in L'Estrange v. Graucob" (1973) 32 Camb. L.J. 104. Wedderburn (1959) Camb. L.J. 58; Allan (1967) 41 Australian L.J. 274 For American views on the subject, see "Exceptions to the Rule of Form and Parol Evidence" (1973) 33 La L. Rev. 344; "Parol Evidence Rule in Need of Change" (1972) 8 Gonzaga L. Rev. 88; (1975) 46 Miss L.J. 192; Hale (1925) 4 Oreg L.R. 91.
- 115 See Francis v. Trans Canada Sales (1969) 6 D.L.R. (3d)

- 705 and City of Westminster Properties v. Mudd [1958] 2 All E.R. 733, post.p. 287.
- 116 Wedderburn, K.W., "Collateral Contracts", 1959 Camb. L. J. at p. 60.
- 117 Ibid.
- 118 [1964] 11 L.T.N.S. 278.
- 119 [1887] 15 S.C.R. 1.
- 120 Lindley v. Lacey, op.cit.
- 121 (1969) D.L.R. (3d) 705, commented upon, in Carr, "Oral Statements and Written Contracts" (1970) 28 The Advocate 141.
- 122 Ibid at 708.
- 123 [1912] 8 D.L.R. 390.
- 124 Webster v. Higgin [1948] All E.R. 127.
- 125 Eisler, op.cit., at 394.
- 126 Ibid.
- 127 [1951] 1 K.B. 805.
- 128 Ibid, at 808.
- 129 [1969] 3 W.L.R. 139 (C.A.).
- 130 [1958] 2 All E.R. 733.
- 131 In at least two recent Canadian decisions, Alampi v. Schwartz (1964) 43 D.L.R. (2d) 11 and Hawrish v. Bank of Montreal (1969) 2 D.L.R. (3d) 600, parol evidence was excluded where arguably it should not have been. While it is possible to argue that the first was wrongly decided and the second decided on other grounds, the rule still appears to retain some of its traditional force by virtue of these decisions.
- 132 Waddams, op.cit., Note 101, at 590; see also Sweet, (1967) 53 Cornell L. Rev. at 1056.

- 133 See Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill L.J. at 291-293.
- 134 [1932] A.C. 562.
- 135 The recent developments from Donoghue v. Stevenson which have extended the concept of negligence to cover some aspects of economic loss are discussed supra p.206.
- 136 [1893] 1 Q.B. 256 (C.A.).
- 137 At 266, 268.
- 138 Carlill was used in the recent New Zealand case of N.Z. Shipping Co. v. Satterthwaite [1974] 1 All E.R. 1015. Using the case with the concept of agency, the court was able to circumvent the problem that privity posed for the defendant stevedores, not parties to the contract of carriage, who were claiming the protection of the exception clause within the contract.
- 139 [1951] 2 K.B. 854.
- 140 (1966) 57 D.L.R. (2d) 15, affirmed [1967] 60 W.W.R. 497.
- 141 At 18.
- 142 [1911-13] All E.R. 83.
- 143 At 90.
- 144 (1970), 10 D.L.R. (3d) 395 (Ont. H.C.) affirmed (1971) 20 D.L.R. (2d) 650 (Ont. C.A.).
- 145 At 404.
- 146 15 P.R. (2d) 1118, 88 A.L.R. 521 (Wash. Sup. Ct. 1932).
- 147 11 N.Y. (2d), 181 N.E. (2d), (N.Y., C.A. 1962).
- 148 167 Ohio St. 244, 147 N.E. (2d) 612 (Ohio Sup. Ct. 1958).
- 149 See Scrutton v. Midland Silicones, [1962] 1 All E.R. and International Harvester Ltd. v. Carrigan (1958), 100 C.L.R. 644 (Aust. H.C.).

- 150 [1974] 1 All E.R. 1015, commented upon in (1975) 4 Anglo-Am L. Rev., 114. See also Duggan, "Off-loading the Eurymedon", (1974) 9 M.U.L.R. 753.
- 151 For a discussion of a consumer's rights on assignment see Ziegel, "Consumer Credit in Canada" (1970) 8 Alta. L. Rev. 59 at 69; Feltham (1962) 40 C.B.R. 461; Ziegel, (1970) 48 C.B.R. 309.
- 152 [1962] O.R. 310.
- 153 At 322.
- 154 See for example, Rand Investment v. Kwiakowski and Kwiakowski (1962), 37 D.L.R. (2d) 211; Rapid Corp. Ltd. v. Geintzer [1963] C.S. 454; Citizens Finance Co. v. Sanford [1964] 1 O.R. 573; Rand Investments Ltd. v. Bertrand et al. (1966) 58 D.L.R. (2d) 372; Range v. Corporation de Finance Belvedere [1969] S.C.R. 492, 5 D.L.R. (3d) 257.
- 155 (1970) 13 D.L.R. (3d) 134.
- 156 Ibid, at 136.
- 157 Alberta, The Farm Implement Act, Manitoba, Farm Machinery and Equipment Act; Saskatchewan, Agricultural Implements Act; and P.E.I. Agricultural Implement Act.
- 158 Dept. of Justice, 1972.
- 159 B.C. Trade Practices Act, s. 1(1).
- 160 Alberta, Unfair Trade Practices Act, s. 1(a).
- 161 B.C. Trade Practices Act, s. 1(1).
- 162 Alberta, Unfair Trade Practices Act, s. 1(h).
- 163 Ontario Business Practices Act, s. 1(2).
- 164 Trade Practices Act, s. 52, s. 64 and s. 82.
- 165 Neptune Acceptance Ltd. v. Williams [1975] 5 O.R. (2d) 158.

- 166 See British Columbia, Consumer Protection Act, S.B.C. 1967, c.14, s.15; Alberta, Conditional Sales Act, R.S.A. 1970, c.61, s.18.1(2), Saskatchewan, Cost of Credit Disclosure, S.S. 1967, c.85, s.16A, Manitoba, Consumer Protection Act, S.M. 1970 c. C200, s.67; Ontario, Consumer Protection Act, R.S.O. 1970 c.82, s.42a. Quebec, Consumer Protection Act. S.Q. 1971, c.74 s.19. New Brunswick, Cost of Credit Disclosure Act, s.20A. Nova Scotia, Consumer Protection Act R.S.N.S. 1968 c.53 s.20B. PEI, Consumer Protection Act S.P.E.I., 1967 s.16, s.20A Newfoundland, no legislation.
- 167 Alberta Unfair Trade Practices Act, s.1(h)(iii).
- 168 B.C. Trade Practices Act, s.1(1).
- 169 Ontario, Business Practices Act, s.4(4) cf. s.42(a) Ontario Consumer Protection Act.
- 170 Treitel, The Law of Contract (3d) London, Stevens & Sons 1970 at 356.
- 171 Janson v. Driefontein Consolidated Mines Ltd., [1902] A.C. 484.
- 172 (1938) S.C.R. 1.
- 173 For an analysis of the doctrine of public policy in the law of contract see Shand, "Unblinking the Unruly House: Public Policy in the Law of Contract" (1972) Camb. L.J. 144.
- 174 [1974] 3 All E.R. 616, cited in Clifford Davis Management Ltd. v. WEA Records, [1975] 1 All E.R. 237, post p. 323.
- 175 At 623. It should be noted that a later Court of Appeal decision with a similar fact situation, relied on Schroeder and in particular the notion of inequality of bargaining power in setting aside the contract without relying on public policy and illegality considerations but simply on the basis of unequal bargaining positions: see Clifford Davis Management v. WEA Records post p. 323.
- 176 For a discussion of the development of duress and undue influence, see Trebilcock, Fair Exchange of Values in

- Sales Transactions, The Doctrine of Unconscionability, O.L.R.C. Sale of Goods Project, June 1973 at 9-27; Sutton, "Duress By Threatened Breach of Contract" (1974) 20 McGill Law Journal 554; Winder, "The Equitable Doctrine of Pressure" (1966) 82 L.Q.R. 165.
- 177 Cumming v. Ince (1874) 11 Q.B. 112.
- 178 For a discussion of the present status of the two doctrines in a comparative respect see Chunn, "Duress and Undue Influence - A Comparative Analysis" (1970) Baylor L. Rev. 572.
- 179 (1866) 2 Ch. App. 55 at 61.
- 180 [1934] 1 K.B. 380.
- 181 (1887) 36 Ch. D. 145.
- 182 [1974] 3 All E.R. 757.
- 183 [1955] 1 Ch. D. 317.
- 184 (1973) 32 D.L.R. (3d) 749 (B.C.S.C.), commented on, Binchy, "The Onward March of Undue Influence" (1974) 20 McGill L.J. 608.
- 185 (1731) 2 Str. 915.
- 186 [1903] P. 184.
- 187 For discussion of economic duress, see Winder, op.cit., Note 176, Cornish, "Economic Duress" (1966) 29 M.L.R. 428; Dalzell, "Duress by Economic Pressure" (1942) 20 N.C.L.R. 237; Dawson, "Economic Duress - An Essay in Perspective" (1947) 45 Michigan Law Review 253; Dawson, "Economic Duress and the Fair Exchange of Values in French and German Law" (1937) 11 Tulane Law Review 345; Courtade, "Contracts - A Question of Duress" (1970) 22 Bay L. Rev. 260; Hale, "Bargaining Duress and Economic Liberty" (1941) 43 Columbia Law Review, 603.
- 188 (1925) 25 S.R. (N.S.W.) 151.
- 189 (1925) 34 C.L.R. 38.

- 190 [1941] S.C.R. 419: cp. Peter Kiewit Sons Company of Canada Ltd. v. Eakins Construction Ltd. (1960) S.C.R. 361.
- 191 [1958] 102 C.L.R. 108.
- 192 [1956] 56 S.R. 323.
- 193 At 323.
- 194 [1964] A.C. 1129.
- 195 Anson's Law of Contract 24th ed. Oxford 1975.
- 196 See, for example, U.S. v. Bethlehem Steel 315 U.S. 289; (3rd Circ. 1942); Vines v. General Outdoor Advertising Co., 171 F2d 487; (2nd Circ. 1948); U.S. v. Bell 259 F Supp. 602; (U.S. Dist. et (OKLA) 1966); 1 Cal. Rptr 12 (Calif. Sup. Ct. 1959).
- 197 50 A 2d 97 (N.J. Ch. Ct. 1946).
- 198 Ibid, at 100.
- 199 Ibid.
- 200 Leeper v. Beltrami, 1 Cal. Rptr 12 (Calif. Sup. Ct. 1959).
- 201 Gallagher Switchboard Comp. v. Heckler Electric Co. 232 N.Y.S. 2d 590 (N.Y. Sup. Ct. 1962).
- 202 Molloy v. Bemis Bro. Bag Co. 283 F2d 32, (1st Circ. 1960).
- 203 See Ross Systems v. Linden Dari Delite Inc., 173A 2d 258 (N.J. Sup. Ct. 1961); Joyce v. Year Investments Inc. 196 N.E. 2d 24 (Ill. A.C. 1964); Manno v. Mutual Ben. Health and Accident Assoc. 187 N.Y.S. 2d 709; Young v. Hoagland 212 Cal. 426; Helmerich & Payne v. Colorado Interstate Gas Co. (N.Y. Sup. Ct. 1959); 187A 2d 67 (Del. Sup. Ct. 1962).
- 204 See Oleett v. Pennsylvania Exchange Bank, 137 N.Y.S. 2d 779 (N.Y. Sup. Ct. Ad. 1st 1955); Tri-State Roofing v. Simon, 142A 2d 333 (Penn. Super Ct. 1958); Weinman Pump Manufacturing v. Cline, 183 N.E. 2d 465 (Ohio C.A. 1961); Lawlor v. National Screen Service Corp. 211 2d 934 (U.S. 3d Circ. 1954).

- 205 111 F Supp. 945 (U.S. Ct. Cl, 1953).
- 206 [1969] 2 Ch. 17.
- 207 For a discussion of the effect of this case on the
development of the doctrine, see, Stone "Limits of Non
Est Factum After Gallie v. Lee" (1972) L.Q. Rev. 190.
- 208 (1971) 16 D.L.R. (3d) 201.
- 209 Lickbarrow v. Mason (1787) 2 T.R. 62 at 70.
- 210 At 212-213.
- 211 [1973] 1 All E.R. 193 (C.A.).
- 212 At 200, 201.
- 213 For a more detailed study of the doctrine of uncon-
scionability in Canada see Trebilcock, op.cit., Note
176, also Crawford (1966) 44 Can. B. Rev. 142.
- 214 (1751) 2 Ves. Sen. 125 at 155.
- 215 At 156; for an historical treatment of the doctrine of
unconscionability see Waddams, "Unconscionability in
Contracts", Modern L. Rev. (forthcoming).
- 216 (1778) 1 Bro. C.C. 1 at 9.
- 217 "Immorality As Treason" in The Law as Literature 220 at
226.
- 218 The term is Professor Leff's; (1967) 115 U. Pa. L. Rev.
532.
- 219 (1966) 54 W.W.R. 257 (B.C.C.A.).
- 220 Ibid at 259.
- 221 [1884] 9 O.R. 39.
- 222 [1914] 19 D.L.R. 688 (Alta.).
- 223 [1932] 1 W.W.R. 82 (Man. C.A.).

- 224 [1960] 33 W.W.R. 669 (Man. C.A.).
- 225 (1958) 14 D.L.R. (2d) 599 (Man. C.A.).
- 226 (1973) 32 D.L.R. (3d) 639.
- 227 (1973) 32 D.L.R. (3d) 723.
- 228 (1966) 58 D.L.R. (2d) 466 aff'd 67 D.L.R. (2d) 256.
- 229 (1968) 69 D.L.R. (2d) 260.
- 230 (1968) 3 D.L.R. (3d) 338.
- 231 32 NJ 358, 161 A. 2d 69, (N.J. Sup. Ct. 1960).
- 232 At 95.
- 233 [1974] 3 All E.R. 757. The case has aroused some debate: see for example, Sealey, "Undue Influence and Inequality of Bargaining Power" (1975) 34 Camb. L.J. 21 and Carr, "Inequality of Bargaining Power", 38 M.L.R. (1975) 463. It has been followed in a recent Ontario case, McKenzie v. Bank of Montreal [1975] 7 O.R. (2d) 521; see also Towers v. Affleck [1974] 1 W.W.R. 714 (B.C.S.C.) and Pridmore v. Calvert (1975) 54 D.L.R. (3d) 133 (B.C.S.C.), dealing with unconscionable insurance settlements.
- 234 At 765.
- 235 [1975] 1 All E.R. 237.
- 236 At 239.
- 237 For a history of usury legislation and reactions of different jurisdictions to interest rates, see Benfield, "Money, Mortgages and Migraine - the Usury Headache" (1968) 19 Case Western Reserve L. Rev. 819.
- 238 But see now the U.K. Consumer Credit Act 1974, c. 39.
- 239 The Unconscionable Transactions Act, R.S.O., 1970, c. 377; Consumer Protection Act, S.B.C. 167, c. 14, ss. 17-20A; The Unconscionable Transactions Relief Act, R.S.M. 1970, c. U20; Unconscionable Transactions Re-

lief Act, S.N.B., 1964, c. 14; The Unconscionable Transactions Relief S. Nfld., 1962, No. 38; Unconscionable Transactions Relief Act, R.S.N.S., 1967, c. 319; The Unconscionable Transactions Relief Act, R.S.O., 1970, c. 472; The Unconscionability Transactions Relief Act, S.P.E.I., 1964, c. 35; art. 1040c, Quebec C.C.; The Unconscionable Transactions Relief Act, S.S., 1967, c. 86.

- 240 [1963] S.C.R. 560; commented on, Waterman (1963) U. of T. Fac. L. Rev. 117, Shaffer (1965) 11 McGill L.J. 268.
- 241 See e.g. Att.-Gen. for Ontario v. Barfried (1964), 42 D.L.R. (2d) 137 (S.C.C.); Fribourg Investment Inc. v. Savage and Dame Clavette [1970] C.A. 612 (Que. C.A.) (commented on (1970) 16 McGill L.J. 411); All-Canadian Peoples Finance Ltd. v. Marcjan (1970), 10 D.L.R. (3d) 362 (B.S.C.S.); Miller v. Lavoie (1967), 60 D.L.R. 495 (B.C.A.C.); Unrau v. Modern Finance Ltd. (1970), 12 D.L.R. (3d) 3661 (B.C.C.A.); Brock Acceptance Co. v. Klassen (1969), 5 D.L.R. (3d) 749 (Man. Q.B.); Boutin v. Belvedere Finance [1970] C.A. 389 (Que. C.A.); Longley v. Barbrick (1963), 36 D.L.R. (2d) 672; Collins v. Forest Hill Investment Corp. Ltd. [1967] 2 O.R. 351 (Co. Ct.); Rimilly v. Patry [1970] C.S. 134; Stephen Investments Ltd. v. Leblanc [1963] 41 W.W.R. 442 (Alta. S.C.); Re Scott and Manor Investment Ltd. [1961] O.W.N. 210 (Co. Ct.); Wetter v. Nasgowitz 27 D.L.R. (3d) 489; Moorehouse v. Income Investments Ltd. [1966] 1 O.R. 299; Stopper v. Laurel Credit Plan Ltd. [1968] 63 W.W.R. 168; for general comments, see Davis, (1972), 50 Can. B.R. 296 and Hannan, 1971 Meredith Lectures (McGill Law School at 143 ff.).
- 242 See Trebilcock, "Re-opening Hire Purchase Transactions" (1968) 41 Aust. L.J. 424.
- 243 In 1967, Professor Leff noted in excess of 130 discussions of the section in law reviews and other treatises, 115 U. Pa. L. Rev. 485 (1967); some of the major articles include: Spanogle, "Unconscionability Problems" 117 Univ. Pa. L. Rev. (1968) 931; Ellinghaus, 78 Yale L.J. (1969) 757; Murray, "Unconscionability: Unconscionability", 31 Univ. Pitts. L. Rev. (1969) Speidel, "Unconscionability, Assent and Consumer Protection" 31 Univ. Pitts. L. Rev. 359 (1970); Leff,

"Unconscionability and the Crowd", 31 Univ. Pitts. L. Rev. (1968) 349.

244 See p. 262 supra.

245 For example, B.C. Trade Practices Act s. 3(3) declares agreements involving unconscionability to be unenforceable.

246 See B.C. Trade Practices Act, s. 3(2)(a) and Ontario Business Practices Act s. 2(b).

247 See Note 174.

248 See Ontario Business Practices Act, s. 2(b)(vii).

249 See Alberta, Unfair Trade Practices Act, s. 4(c).

250 Chapt. 12.

251 See the study by Professor W.A.W. Neilson of Osgoode Hall Law School, cited by Ziegel (1967), 68 Columbia L. Rev. 515. See generally on the question of the inaccessibility of the legal process to the public, Carlin, Howard and Messenger, Civil Justice and the Poor (1968), and Susan Marsden-Smedley, "Is the Legal System Any Use to Consumer", Focus, July 1969.

252 Justice Out of Reach, H.M.S.O. July 1970.

253 At 10 and 11.

254 (1934), 47 Harv. L. Rev. 595 at 567.

255 Alberta, Unfair Trade Practices Act, s. 13; B.C. Trade Protection Act s. 24(1).

256 See the comments of the Report of the Task Force on Legal Aid, Ontario 1974, with respect to the present deficiencies of the Ontario Legal Aid Plan.

257 The leading articles on the class action procedure in Canada are Sherbaniuk, "Actions By and Against Trade Unions in Contract and Tort" (1958) 12, U. of Toronto L.J. 151; Kazanjian, "Class Actions in Canada", (1973) 11 Osgoode Hall L.J. 397;

Trebilcock, "Private Law Remedies for Misleading Advertising" (1972) 22 U. of Toronto L.J. 1; McFayden, "Consumer Class Actions", (1973) 4 Queen's L.J. 50; Williams, "Consumer Class Actions in Canada -- Some Proposals for Reform", (1975) 13 Osgoode Hall L.J. 1.

- 258 See for example Rule 75, the Ontario Rules of Practice.
- 259 For recent definitions of "common interest", see Chastain v. British Columbia Hydro and Power Authority, (1973), 32 D.L.R. (3d) 443 and Shaw v. Real Estate Board of Vancouver, (1972), 29 D.L.R. (3d) affirmed (1973), 36 D.L.R. (3d) 250.
- 260 For a case refusing a class action on the basis of separate contracts see Johnston v. Consumers Gas Co. [1898] O.A.I.R. 566 and for a case refusing a class action for damages see, A.E. Osler v. Solomon [1926] 4 D.L.R. 345.
- 261 See for example, Regulation 39 under the Ontario Legal Aid Act.
- 262 For an economic analysis of class actions see Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest" (1975), 4 Journal of Legal Studies 47.
- 263 See the Report of the Task Force on Legal Aid, Ont. 1974, p. 100.
- 264 [1975] 2 W.L.R. 389. In Ontario, the decision in this case is codified in the Business Corporations Act, s. 99(1) which allows representative actions by shareholders on behalf of the corporation and in s. 99(4) which allows the plaintiff to apply for an order for interim costs (i.e. indemnification from the corporation).
- 265 At 399.
- 266 At 400.
- 267 See Neil Williams.
- 268 Cf. Alberta, Unfair Trade Practices Act, s.11(2)(f); B.C. Trade Practices Act s.21.

- 269 The provision is derived from s.27 of the B.C. Trade Practices Act.
- 270 The provision is derived from the B.C. Trade Practices Act, s.1(1).
- 271 The provision is derived from the B.C. Trade Practices Act, s.1(1).
- 272 The provision is derived from s. 68 of the Australia Trade Practices Act.
- 273 The provision is derived from the B.C. Trade Practices Act, s.24(1) with the addition of a provision enacting a substituted class action for civil relief.

V. AN INTEGRATED FRAMEWORK OF PUBLIC AND PRIVATE SANCTIONS

Introduction

The previous three chapters reviewed the existing law and the means of enforcement in the criminal, administrative and private law contexts in terms of the strengths and weaknesses of each method of enforcement in securing the objectives of deterrence and compensation in the regulation of unfair trade practices.

The conclusion to the review of the criminal law stressed the practical difficulties of an exclusively criminal approach concentrated as it is on deterrent and retributive objectives. It was suggested that while criminal sanctions, standing alone, suffer from severe limitations, an extension and modification of the existing sanctions could solve some of the present difficulties.

The review of administrative measures in Chapter III stressed the greater flexibility and efficiency of administrative regimes, at least in performing the deterrence function. The shortcomings of the traditional structure of administrative remedies were seen principally as resulting from exclusion of compensatory objectives from their purview, although modifications were suggested to enable compensatory objectives to be served in some administrative proceedings.

In our examination of the private law approach, it was concluded that the existing substantive law was generally adequate to serve the needs of the consumer but that the remedies available and the means of access to the legal system were in need of some reform. Thus, proposals were advanced to secure effective and relevant civil remedies in the context of misleading advertising and deceptive and unconscionable practices. Reform of access in the private law context was seen primarily as involving the need to eliminate the disincentives against individual suits and class actions. This final chapter addresses itself to the task of evolving a coherent and practical regime of enforcement and access both for public and private enforcement through an integrated framework of criminal, administrative and civil law remedies.

The first section of the chapter reviews briefly the appropriate objectives, in terms of sanctions, for effective trade practices legislation and examines considera-

tions that might shape the implementation of these objectives in a Canadian context. The next section begins with a proposed code of the substantive law prohibitions and the final section outlines an integrated set of proposals utilizing the criminal, administrative and civil sanctions in the enforcement of trade practices legislation.

Objectives Of Sanctions And Procedures

We believe that three objectives are paramount in an effective system of sanctions in the unfair trade practice context: deterrence, compensation, and efficiency. We examine each in turn.

Deterrence. Any effective system of sanctions must ensure that the legal consequences that attach to violations remove any incentive to violate. Economic disincentives are operating at an optimal level if the system of sanctions ensures that violators are penalized in the amount of their gains from violation multiplied by the risk of their apprehension and conviction. As we have earlier shown, Canadian courts, in the imposition of sanctions in their field, have for the most part not come close to this optimum. Even the more modest (and less satisfactory) objective of ensuring that fines "tax" away all gains from violation, ignoring any factor to account for the risk of apprehension, has rarely been achieved. Short of writing an optimal deterrence formula into the Act, which would be too rigid in cases where it is impossible to calculate the gains from violation, we would propose that the sanctions of fines and imprisonment be left much as they are, but provide an additional choice of sanctions having both deterrent and compensatory objectives. One of these is a divestment (unjust enrichment) order in the case where compensation of victims of a violation is impracticable but disgorgement of the gains from violation in favour of the Crown would nevertheless have a deterrent effect approaching optimality.

Compensation. As we have remarked earlier, traditionally deterrence has been seen as the preserve of the criminal law and compensation the preserve of the civil law. It may be true that one can have deterrence without compensation (although effective deterrents should obviate the need for compensation), but it is almost impossible to conceive how any system of private law liability rules could avoid having a deterrent effect. For example, in our context, if

all potential violators knew in advance of a violation that all victims of that violation would have to be compensated in full, all incentive to violate would be removed.

In recognition of the deterrent effects of effective compensation machinery and in recognition of the importance of compensation in its own terms - the right of an aggrieved consumer, prejudiced by a violation, to be made whole, which the conventional criminal law sanctions do not ensure, our proposals for an integrated system of sanctions not only place substantial emphasis on independent individuals and collective civil rights of redress, but also include individual and collective compensation orders in the range of sanctions available to a court following a conviction or following the issue of a final prohibition order.

Efficiency. A number of somewhat disparate considerations can usefully be subsumed under this heading.

(a) The question of whether one increases the investment in public enforcement resources to increase the incidence of apprehensions or instead increases the level of sanctions to reflect the existing probability of apprehension raises important efficiency considerations. What is an optimal investment in public enforcement resources?

(b) Assuming that one can never be sure that the political constraints facing governments have permitted optimality in this respect, efficiency considerations dictate that private law enforcers, willing to spend their own time and money on private law enforcement initiatives, be encouraged to do so. Presumptively, such initiatives are likely to move us closer to optimal enforcement levels. If these had already been attained, it is difficult to see what need or incentive private parties would have to take action.

Accordingly, our proposals on sanctions contemplate parallel public and private law enforcement streams which apply in all three principal enforcement contexts--criminal, administrative and civil.

We regard this concept of the role of the private law enforcer as central to our proposals. Without a recognition of its importance, we are virtually guaranteed under-enforcement as typically under-resourced public enforcement agencies are able to take up seriously only a

fraction of the complaints they receive, let alone undertake independent policing. For example, 5068 complaints were received by the Department of Consumer and Corporate Affairs in the year ending March 31, 1975. Although we are unable to assess the validity of these complaints the Division assigned 20 per cent for investigation, and about two per cent resulted in charges being laid. Fewer than two per cent of all complaints originated with the Director.

We would underscore the fact that private law enforcement initiatives should not be contingent on prior public enforcement activity (e.g. a criminal conviction). Such a pre-condition would substantially undermine the point of encouraging private law enforcement. The importance that the private anti-trust suit has assumed in the U.S. in the general enforcement of anti-trust laws points to the potential for private law enforcement in the trade practices field.

(c) Efficiency considerations also have something to say about the task of defining the substantive prohibitions. Clearly, general, open-ended prohibitions that receive meaning only by constant litigation are wasteful of social resources. On the other hand, a rigid list of specific prohibitions dependent for alteration or addition on the slow wheels of the legislature process to grind out amendments may leave consumers exposed for years to abuses before a legislative cure is found. In our tentative proposals for a scheme of substantive prohibitions we have attempted to provide a high measure of certainty and at the same time sufficient flexibility so that each new abuse contrived is not extended a substantial legislative grace period.

(d) Efficiency considerations also dictate that, where possible, deterrence and compensation objectives should be resolved in a single set of proceedings, avoiding wasteful multiplicity of actions. Our sanctions structure strongly reflects this consideration. Such a structure also enables adjustments to be made in the traditional deterrent sanctions to reflect compensatory relief granted, thus avoiding over deterrence and misallocation of the violator's resources.

(e) Administrative efficiency dictates that clear jurisdictional demarcations be settled so that duplication, and thus waste, of public enforcement resources are eliminated. If multiple jurisdictions are involved, as in Canada, efficiency also dictates substantial uniformity in the substantive

prohibitions and the structure of the sanctions, so that jurisdiction-hopping is eliminated, consumer confusion reduced, mass consumer education programs made more feasible, multiple and possible contradictory compliance requirements on the part of business avoided, and wasteful litigation to interpret different shades of language in different but functionally similar statutes minimized.

(f) Efficiency considerations may also have something to say about the choice of adjudicatory body. Ease of access and likely docket delays should be considerations in the choice of local courts, a central court, or a central regulatory agency. Considerations such as whether a central regulatory agency, particularly one with rule-making functions, is likely to maintain its independence of outlook in the face of a highly focused and sustained industry presence also need to be weighed. The wide range of criminal, administrative and civil sanctions we are proposing be made available to the adjudicatory body, often in consolidated proceedings, should also influence the choice of the adjudicatory forum and process. A judgment is also called for on the question of whether the determinations entailed in the trade practice area call for the highly specialized expertise often associated with regulatory agencies or instead for common-sense decisions by adjudicators regularly exposed to a wide spectrum of human problems and thus with some sensitivity to the question of what the average citizen might properly regard as a deceptive or unconscionable practice.

Our own tentative bias is probably clear. We favour leaving all adjudications in particular proceedings with local courts, as has generally been the case under Canadian legislation to this point. We see no case for a specialized regulatory agency or a specially designated court, and indeed see considerable potential dangers in both these options. The trade practice field lends itself extremely well to strong applications of common-sense adjudicatory decision-making, a sense of the community's feel for what is fair and reasonable, and local courts who in their daily work are constantly dealing with a wide cross-section of the community are strategically well-placed to provide this perspective. In this respect, of course, we are proposing a substantial departure from U.S. traditions in this field. However, we remain to be convinced that our faith in the courts, equipped with an adequate legislative framework, is misplaced.

(g) Efficiency considerations also dictate reduced reliance on the criminal law process, with the attendant inordinate delays described in an earlier chapter, and greater use of faster-acting administrative orders to compress the time frames in which mass prejudice from a violation can occur. Similarly, efficiency gains can be achieved by substituting collective civil redress mechanisms for individual suits, wherever feasible, both to avoid wasteful multiplicity of proceedings and to ensure that meritorious individual claims are in fact pressed, thus moving enforcement levels closer to optimal levels of deterrence and compensation.

(h) Efficiency considerations also dictate the evolution of a coherent set of internal public enforcement priorities given scarce enforcement resources. High priority should be attached to violations where information costs to consumers are highest, e.g. complex (and usually expensive) goods and services, goods and services where frequent repeat sales are not contemplated and violations in urban areas where large and unstable populations make communication of information about suppliers amongst consumers difficult. Priority should also be accorded to violations in terms of the magnitude of their potential impact upon consumers, which is partly a function of the size of the transaction in question and/or partly a function of the number of potential transactions likely to be affected by the violation. A substantial priority should also be accorded to independent policing of mass electronic media advertising where the fleeting and often subtle nature of the message makes reactive enforcement responses to written consumer complaints an unsatisfactory index of appropriate levels of enforcement activity in this area.

Proposals For a Substantive List of Statutorily Proscribed Practices

The following analysis and proposals draw heavily upon existing statutory precedents. In compiling the substantive list of practices the following acts were used as guides: the Alberta Unfair Trade Practices Act, the British Columbia Trade Practices Act, the Ontario Business Practices Act, the U.S. Uniform Consumer Sales Practices Act, Bill C-2, the Australian Trade Practices Act, the U.K. Trade Descriptions Act, and the U.S. Federal Trade Commission Act. This list is not advanced as a definitive statement of the appropriate prohibitions, but rather as a tentative description

of the structure and reach of the prohibitions.

The Approach to the Definitional Task. In defining a substantive list of statutorily proscribed practices, at least four basic alternative approaches are evidenced in existing legislation.

- (i) The formulation of a complete list of practices prohibited by statute as exemplified in the U.K. Trade Descriptions Act 1967.

[COMMENT: The advantage of this route is primarily clarity and exhaustiveness. However, unless very comprehensively drafted, this alternative is the most limited of the four approaches and affords the consumer the least protection against "creative" malpractice.]

- (ii) A general prohibition against deceptive, misleading (and unconscionable) practices as exemplified in s. 5 of the Federal Trade Commission Act and in s. 36(1)(a) of Bill C-2.

[COMMENT: This approach, while apparently covering all eventualities, promotes uncertainty and invites costly litigation.]

- (iii) A general prohibition against deceptive, misleading and unconscionable practices, followed by a specific list of practices which does not limit the generality of the prohibition. This approach is exemplified in the Alberta Unfair Trade Practices Act.

[COMMENT: This route allows more flexibility than (ii) in that the list of practices provides specificity while the general prohibition covers the possibility that certain practices not listed specifically can still be dealt with.]

- (iv) A general prohibition against deceptive, misleading and unconscionable practices followed by a specific list of practices which does not limit the generality of the prohibition plus a regulation-making power to proscribe additional practices. The approach is exemplified in the B.C. Trade Practices Act and the Ontario Business Practices Act.

[COMMENT: This is clearly the most far-reaching prohibition in that while the list of practices provides some specificity, the general prohibition coupled with the regulation-making power makes the ambit of the statute very open-ended.]

It is submitted that option (iv) reflects a reasonable balance between uncertainty and flexibility, subject to some qualifications. First, it seems appropriate that machinery be developed, perhaps similar to that provided for in s. 19 of the Consumer Packaging and Labelling Act and the U.K. Fair Trading Act, for proposed regulations to be published and commented upon by interested parties before being promulgated. Secondly, it is arguable that it might not be apt to attach criminal sanctions to the general prohibition per se and certainly not to practices added by regulation and probably not even to all the enumerated initial practices. In particular, the very open-textured nature of some of the unconscionable practices seems inappropriate as the basis of criminal sanctions (despite the fact that the B.C. and Ontario Acts have adopted this course). In accordance with our earlier arguments favouring a restricted role for the criminal law in this field, we would prefer that criminal sanctions only attach to enumerated initial practices involving deception and only then in cases involving fraud or lack of due care or diligence as elaborated in our previous discussion of the criminal law. Administrative and civil sanctions would of course apply to the whole ambit of proscribed practices. If option (iv) is unacceptable, option (iii) appears to be a workable second-best, although many of the above qualifications would still apply.

The General Prohibition. The general prohibition is intentionally drafted in an open-ended manner so as not to exclude practices not specifically caught within the specific list. Thus the following type of general section is proposed.

Any false, misleading or deceptive representation, conduct, act or practice, which has the tendency, capability or effect of deceiving or misleading a person, or any unconscionable act or practice is a violation of this act, whether such representation conduct, act or practice occurred before, during or after a consumer transaction and notwithstanding that the consumer transaction

was not completed or did not take place and includes any false or misleading or deceptive representation, conduct, act or practice intended to promote directly or indirectly a business interest with consumers whether or not specifically relating to a consumer transaction, without limiting the generality of the foregoing, includes any representation, conduct, act or practice of the following kinds:¹

[COMMENT: This section provides the setting for the Act by integrating the common law doctrines of terms and representations and the equitable jurisdiction over unconscionability and solves the Nunes Diamond problem of the misrepresentation committed within a contractual situation but after the formation of the contract. Moreover, it has additional force, particularly in an administrative context, by reason of the fact that the agreement need not have been completed in order that enforcement proceedings may be brought and allows more effective control over other abuses such as post-contractual collection practices. It will also be noted that not only advertising in a conventional sense but all forms of sales representations are embraced by this definition. The reference to representations intended to promote directly or indirectly business interests would enable e.g. false claims by a supplier about his contributions to environmental protections to be policed.]

The Specific List of Practices. It is submitted that without limiting the generality of the general prohibition, a specific list of practices including all or most of the following be appended. This list is tentative only and is intended to be no more than suggestive:

1. A representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, qualities, components, uses or benefits that it does not have:² (B.C. Trade Practices Act s. 2(3)(2)).

[COMMENT: This prohibits claims or conduct which misrepresents such characteristics as the durability of

a product or the efficacy of a service.]

2. A representation that the supplier has a sponsorship, approval status, affiliation, or connection that he does not have:³ (B.C. Trade Practices Act s. 2(3)(b)).

[COMMENT: This prohibits suppliers from using bogus affiliations to improve their own status - e.g. claiming "authorized dealership" when this is not the case.]

3. A representation that the subject of a consumer transaction is of a particular standard quality, grade, style or model if it is not:⁴ (B.C. Trade Practices Acts 2(3)(c)).

[COMMENT: This prohibits false or deceptive claims regarding the nature of the product or service such as a claim that the model or style is the latest when it is not, or that a certain product is equivalent to another product or model when it is not.]

4. A representation that the subject of a consumer transaction has been used to an extent that is different from the fact:⁵ (B.C. Trade Practices Act s. (2)(3)(d)).

[COMMENT: This prohibits claims which misrepresent the nature of the past use of the product - e.g. a representation that a car taken as trade-in is a "demonstrator".]

5. A representation that the subject of a consumer transaction is new or unused if it is not, or if it is deteriorated, altered, reconditioned, or reclaimed:⁶ (B.C. Trade Practices Act s. (2)(3)(e)).

[COMMENT: This prohibits claims that represent as new a product which has been used or returned by a customer, or claims that a product which over time has deteriorated is new and claims that a product is slightly used when it has been used a great deal.]

6. A representation that the subject of a consumer transaction has a particular prior history or

usage if it has not:⁷ (B.C. Trade Practices Act s. 2(3)(f)).

[COMMENT: This prohibits claims which misrepresent the history of a product - e.g. "driven on Sundays to church and back" - or a representation that an appliance is "freight damaged" when it has been used and traded in.]

7. A representation that the subject of a consumer transaction is available or is available at a bargain price for a reason that is different from the fact:⁸ (B.C. Trade Practices Act s. 2(3)(g)).

[COMMENT: This prohibits advertising such things as "fire sale" or "lost our lease" where this is not true or claims such as "free subscriptions to boost our circulation" where this is not true.]

8. A representation that the subject of a consumer transaction has been made available in accordance with a previous representation if it has not:⁹ (B.C. Trade Practices Act s. 2(3)(h)).

[COMMENT: This prohibits the passing off of a different product or service as the one previously advertised.]

9. A representation that goods or services are available if the supplier has no intention of supplying or otherwise providing the goods or services as represented or if the supplier does not have any reasonable grounds on which to believe that he has the ability to supply or otherwise provide the goods or services as represented:¹⁰ (Alberta, Unfair Trade Practices Act s. 4(1)(d)(x)).

[COMMENT: This prohibits bait and switch tactics.]

10. A representation that a price benefit or other advantage over another supplier's goods or services exists, if it does not:¹¹ (B.C. Trade Practices Act, s. 2(3)(j)).

[COMMENT: This prohibits claims which misrepresent the re-

duction in price of an item, the regular price of an item, or value of other benefits that come with the product. It also provides a limited avenue of attack on artificial product differentiation. It would also give a supplier a right of recourse in the event of misleading comparative advertising by a competitor.]

11. A representation that a service, part, replacement, or repair is needed if it is not:¹² (B.C. Trade Practices Act s. 2(3)(k)).

[COMMENT: Self-evident.]

12. A representation that any solicitation of, or any communication with, a consumer by a supplier is for a purpose or intent different from the fact:¹³ (B.C. Trade Practices Act s. 2(3)(1)).

[COMMENT: This prohibits suppliers gaining access to a consumer under a reason different from the true purpose, e.g. a claim by a supplier that he is taking a survey when the real purpose is a sale or claims of a "free" promotion of goods which the consumer must ultimately purchase.]

13. A representation that a consumer transaction involves or does not involve rights, remedies, or obligations if the representation is deceptive or misleading:¹⁴ (B.C. Trade Practices Act, s. 2(3)(m)).

[COMMENT: This prohibits conduct that misleads the consumer as to the nature of his rights and obligations, such as representing a warranty as unconditional, or a down-payment as recoverable when this is not the case.]

14. A representation by conduct or otherwise as to the authority of a salesman, representative, employee, or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact:¹⁵ (B.C. Trade Practices Act, s. 2(3)(o)).

[COMMENT: This prevents situations whereby a salesman represents his authority as final where he does not have such authority and the supplier can later disavow responsibility for the salesman's representations.]

15. Giving an estimate or quotation of the price of the goods or services which is materially less than the price of the goods or services as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express and freely given consent of the consumer:¹⁶ (Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xvii)).

[COMMENT: This prohibits the deliberate under-estimation of the cost of a product or service as often occurs, e.g. in the auto repair or moving industries.]

16. Where the price of a unit of a consumer transaction is given in an advertisement, display, or representation, the failure to give, in the same advertisement, display, or representation, at least equal prominence to the total price of the consumer transaction:¹⁷ (B.C. Trade Practices Act, s. 2(3)(g)).

[COMMENT: This prohibits the use of deceptive price tactics whereby the actual price is hidden within the claim of a unit price - e.g. the cost of a set of encyclopedias as 10¢ a day when the full price is \$400 or the claim of dance lessons at \$10 a lesson when the consumer is compelled to pay a total price of \$1000.]

17. A representation using exaggeration, innuendo or ambiguity as to a material fact, or failure to state a material fact, if such use or failure misleads or tends to mislead.¹⁸ (Ontario, Business Practices Act, s. 2(a)(xiii)).

[COMMENT: This prohibits the use of exaggeration as to the nature or utility of a product which would mislead the customer as to its worth - e.g. claims that a product is "good for life". In addition, it pro-

scribes certain classes of non-disclosure of material facts and thus lays the basis for a limited affirmative disclosure doctrine.]

18. A representation that the consumer will receive a rebate, discount or other benefit as an inducement for entering into the consumer transaction in return for giving the supplier the name of prospective customers or otherwise helping the supplier enter into other consumer transactions if the receipt of the benefit is contingent upon an event occurring after the consumer enters into the transaction.¹⁹ (U.S. Uniform Consumer Sales Practices Act, s. 3(11)).

[COMMENT: This forbids referral selling.]

19. An inducement or invitation to another person to participate in a scheme of pyramid selling.²⁰ (Bill C-2, s. 36.3(2).)

[COMMENT: This prohibits pyramid selling schemes.]

20. The use of contest, lotteries, or games of chance or skill, or mixed chance or skill, or the offer of gifts, prizes and other free items unless
 - (a) there is adequate and fair disclosure of the number and value of the prizes and the chances of winning in any area to which prizes have been allocated,
 - (b) distribution of the prizes or gifts is not delayed,
 - (c) selection of participants or distribution of prizes is made on the basis of skill or on a random basis in any area to which prizes have been allocated.²¹

[COMMENT: This prohibits deceptive practices in promotional contests.]

21. A representation in the form of a statement, warranty or guarantee of the performance,

efficacy or length of life of a product that is not based upon an adequate or proper test thereof, the proof of which lies upon the person making the representation (Bill C-2, s. 36(1)(b)).

[COMMENT: This incorporates a limited advertising substantiation requirement in line with our previous analysis of this subject.]

22. A representation that a test of the performance, efficacy or length of life of the product has been made by any person is misleading unless the representation was previously made or published by the person by whom the test was made or permission to publish the representation was given in writing by the person by whom the test was made.²²

[COMMENT: This adds a further element to the requirement of advertising substantiation in no. 21.]

23. A representation as to the results of any test of the performance, efficacy or length of life of a product where the representation is false, deceptive or misleading.²³

[COMMENT: This prohibits misrepresentations of test results.]

24. A representation that the method of manufacture, production, processing or reconditioning is of a particular type, standard or quality when it is not, or a representation concerning the person by whom manufactured, place and date of manufacture, where it is deceptive, misleading or false.²⁴

[COMMENT: This prohibits claims which misrepresent the nature of the method or means of production e.g. claims that a product is "hand-made" when it is not, as well as prohibiting false claims concerning the place or date of manufacture - e.g. "made in Canada" when this is untrue.]

25. The entering into of a consumer transaction in which the supplier had made a misleading state-

ment of opinion on which the consumer was likely to rely to his detriment:²⁵ (U.S. Uniform Consumer Sales Practices Act, s. 4(d)(6)).

[COMMENT: This prohibits misleading expressions of opinion, not necessarily previously covered in prohibitions which address themselves to factual misstatements, such as misleading representations as to the potential earning power of a consumer who buys a home knitting machine from the supplier.]

NOTE: The following practices are often thought of as examples of unconscionable practices:

26. The subjection of the consumer to undue pressure by a supplier to enter into a consumer transaction:²⁶ (Alberta Unfair Trade Practices Act, s. 4(1)(a)).

[COMMENT: This prohibits the use of high pressure sales tactics.]

27. The entering into of a consumer transaction where the consumer was taken advantage of by his inability or incapacity reasonably to protect his own interests by reason of his physical or mental infirmity, ignorance, illiteracy, age, or his inability to understand the character, nature, or language of the consumer transaction, or any other matter related thereto:²⁷ (B.C. Trade Practices Act, s. 3(2)(b)).

[COMMENT: This prohibits unconscionable sales tactics that exploit individual weaknesses, e.g. those of elderly people or people who speak little English.]

28. The entering into of a consumer transaction, where at the time the consumer transaction was entered into, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by like consumers:²⁸ (B.C. Trade Practices Act, s. 3(2)(c)).

[COMMENT: This prohibits the entering into of transactions where the consumer believes that the goods are

competitively priced when in fact the goods are grossly over-priced.]

29. The entering into of a consumer transaction when at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the price by the consumer:²⁹ (B.C. Trade Practices Act, s. 3(2)(d)).

[COMMENT: This prohibits the sale of goods to a consumer, e.g. on generous security, when the consumer is unlikely to be able to meet his payments.]

30. The entering into of a consumer transaction where the consumer was unable to receive a substantial benefit from the subject of the transaction:³⁰ (U.S. Uniform Consumer Sales Practices Act, s. 4(c)(3)).

[COMMENT: This prohibits conduct such as the sale of two vacuum cleaners to two poor families whom the salesman has reason to believe share the same apartment.]

31. The entering into a consumer transaction where the terms or conditions on, or subject to, which the consumer transaction was entered into by the consumer are so harsh or adverse to the consumer as to be inequitable:³¹ (B.C. Trade Practices Act, s. 3(2)(e)).

[COMMENT: This provision preserves a general residual equitable jurisdiction to review oppressive contractual provisions.]

Proposals For Access And Enforcement

Introduction. Under our proposals summarized in Table I, either the State or a private consumer may bring proceedings for a criminal conviction, a prohibition order or civil redress. However, within the first two types of proceedings, the traditional classifications of relief are partially merged. Thus, within a criminal action brought by either the State or an individual, ancillary to a conviction, an order for compensation for losses occasioned by the misconduct and ancillary administrative remedies are available.

TABLE I

SUMMARY STRUCTURE OF PROPOSED ENFORCEMENT AND ACCESS PROCEDURES

ENFORCEMENT PROCESS	DIRECTOR	INDIVIDUAL
NON-JUDICIAL ENFORCEMENT PROCEDURES	<ol style="list-style-type: none"> order to furnish information regarding possible violations order for advertising substantiation assurances of voluntary compliance (A.V.C.) 	<ol style="list-style-type: none"> complaint to Director application by six persons for an inquiry into an alleged violation
ENFORCEMENT PROCEEDINGS		
1. CRIMINAL		1. CRIMINAL:
A. Procedure	<ol style="list-style-type: none"> CRIMINAL: for <ul style="list-style-type: none"> an offence under the Act after an inquiry by the Director upon his own initiative or upon the application for an inquiry by six persons breach of an order of the Director (see #2, 3, 4 above) breach of an administrative order (see II below) the Director may apply to the Attorney-General to commence and maintain a criminal action (either summary or indictable). 	<ul style="list-style-type: none"> private information for a summary offence under the act
B. Defences	<ol style="list-style-type: none"> compliance with A.V.C., or (a) due care, and (b) offer of amends, and (c) corrective advertising 	<ol style="list-style-type: none"> compliance with A.V.C., or (a) due care, and (b) offer of amends, and (c) corrective advertising
C. Sanctions	<ol style="list-style-type: none"> Conviction: prison and/or fine Ancillary to conviction: <ol style="list-style-type: none"> prohibition order order for corrective advertising divestment (unjust enrichment) order upon application at time of sentence from A-G, Director or aggrieved party(ies), order for compensation or mass relief applying civil damages rules (see III). residual relief where appropriate, including rescission, restitution and contract modification. 	<ol style="list-style-type: none"> Conviction: prison and/or fine Ancillary to conviction: <ol style="list-style-type: none"> prohibition order order for corrective advertising divestment (unjust enrichment) order upon application at time of sentence from A-G, Director or aggrieved party(ies), order for compensation or mass relief applying civil damages rules (see III). residual relief where appropriate, including rescission, restitution and contract modification.
II. ADMINISTRATIVE		II. ADMINISTRATIVE
A. Procedure	<ol style="list-style-type: none"> ADMINISTRATIVE where a violation has occurred or is about to 	<ol style="list-style-type: none"> ADMINISTRATIVE where a violation has occurred or

for an administrative order (subject to right of Director to intervene) or may apply to the Director to commence the action for a prohibition order and ancillary relief.

Compliance with A.V.C.

1. Prohibition order
2. Ancillary to Prohibition order:
 - (a) order for corrective advertising
 - (b) divestment (unjust enrichment) order, or
 - (c) order for compensation or mass relief,
 - [(d) residual relief where appropriate, including rescission, restitution and contract modification.]

upon application from an individual or group, may commence an action for a prohibition order and ancillary relief.

Compliance with A.V.C.

1. Prohibition order
2. Ancillary to Prohibition order:
 - (a) order for corrective advertising
 - (b) divestment (unjust enrichment) order, or
 - (c) order for compensation or mass relief.
 - [(d) residual relief where appropriate, including rescission, restitution and contract modification.]

III. CIVIL

A. Procedure

III. CIVIL

- [(a) where a violation has occurred], or
- (b) where a violation has occurred and the offender convicted of a criminal offence,
- or
- (c) where a violation has occurred and a prohibition order has been issued and an individual [or class] has suffered loss or damage, and a civil action is in the public interest the Director may commence a substituted action on behalf of the individual [or class]

III. CIVIL

- [(a) where a violation has occurred] or
- (b) where a violation has occurred and the offender convicted of a criminal offence, or
- (c) where a violation has occurred and a prohibition order has been issued an individual [or class] may commence a civil action

B. Remedies

1. Damages (minimum \$100 in an individual suit) including loss to expectation and reliance interests, loss of enjoyment and convenience, and exemplary damages.
- [2. Residual relief where appropriate including rescission, restitution and contract modification]

1. Damages (minimum \$100 in an individual suit) including loss to expectation and reliance interest loss of enjoyment and convenience, and exemplary damages,
- [2. Residual relief where appropriate including rescission, restitution and contract modification]

COSTS IN CRIMINAL ADMINISTRATIVE AND CIVIL PROCEEDINGS

Costs of investigation and proceedings

Full indemnification of legal costs from defendant if proceedings successful; no costs order against complainant if proceedings unsuccessful unless action frivolous or vexatious (i.e. a one-way costs rule.)

Similarly, upon the application for a prohibition order, ancillary relief is available in the form of compensation and various subsidiary administrative orders.

The State procedure assumes the creation of a position of "Director" with authority vested in the holder of the office to apply to the Attorney-General for initiation of criminal proceedings, to institute an application for a prohibition order in the courts upon his own initiative or upon the application of an individual or group, or to institute "substituted" civil actions on behalf of individuals or groups where the public interest so dictates.

An individual consumer may, upon his own initiative, lay an information and conduct a criminal prosecution for summary conviction offences and seek ancillary compensatory and administrative sanctions. An individual consumer or class of consumers may also commence an action for a prohibition order and with it similar ancillary sanctions. Finally, an individual consumer or class of consumers may commence independent civil redress proceedings.

It is obvious that there is a strong element of parallelism in our proposed scheme for enforcement and redress. The justification for this lies in our earlier analysis of the efficiencies to be achieved by integrating deterrent and compensatory objectives into a single set of proceedings, whatever form they may take.

Public Enforcement.

(i) *Powers of the Director.* Under the proposed structure the position of Director necessitates vesting the holder of the office with powers similar to those now vested in the B.C., Alberta and Ontario Directors of Trade Practices, and involves an extension of the authority now held by the Director of Investigation and Research under the Combines Investigation Act, whose present powers are limited principally to investigation and inquiry under s.8, authority to obtain court orders to sustain the inquiry under s.12, and a referral function by which evidence of contravention is remitted to the Attorney-General for possible prosecution under s.15. Similar but more extensive powers of investigation and inquiry are vested in the provincial Directors.³²

As the Combines Investigation Act provides solely

for criminal sanctions, enforcement decisions rest ultimately with the Department of Justice. The Director of Investigation and Research has few formal direct powers of enforcement as such under the Act. Under our proposed structure, the enforcement processes utilizing administrative and civil remedies will be vested in the Director. This proposal follows the provincial precedents in B.C. and Alberta where the Director is empowered to commence actions for injunctive and other relief upon his own initiative³³ and is empowered to commence a substituted action on behalf of a consumer or class of consumers.³⁴

The specific role of the Director within each type of proceeding is discussed more fully below. However, at the outset we propose that the following general powers based on those now held by the Director of Investigation and Research under the Combines Investigation Act and the provincial trade practice Directors be vested in the Director:

- (a) enforcing the Act and the regulations,³⁵
- (b) receiving and acting on complaints respecting consumer transactions and, where applicable, attempting to resolve complaints by mediation, or other methods acceptable to the parties,³⁶
- (c) directing an inquiry into matters in respect of which he has reason to believe that a provision³⁷ of the Act had been or is about to be contravened³⁸ or whenever he is directed to do so by the Minister,³⁹
- (d) informing consumers and suppliers on a continuing basis of the provisions of the Act, the regulations and their respective rights and duties,⁴⁰
- (e) publishing, from time to time, as advisable, or upon the direction of the Minister, reports respecting the administration and enforcement of the Act and the regulations,⁴¹
- (f) holding public hearings on proposed regulations under the Act and reporting thereon to the Minister,

- (g) maintaining public records of all enforcement proceedings taken under the Act, all criminal judgments, interim or final administrative orders, all civil judgments in substituted actions rendered under the Act, all assurances of voluntary compliance entered into under the Act, and all material supplied under advertising substantiation orders issued under the Act.⁴²

Clearly to sustain these powers of enforcement, supplementary powers of inquiry are necessary. Thus the following authority to order information or documents to be furnished are necessary. These powers for the most part are already vested in the Federal and Provincial Directors and include:

- (a) power to require a consumer or supplier to furnish information to the Director respecting any matter under investigation, including power to require a supplier or class of suppliers to submit documentation to substantiate advertising claims.⁴³
- (b) power to apply to the court for an order permitting the Director to enter premises and remove records and documents relevant to the matter under investigation.⁴⁴

The discretionary duties of the Director would involve:

- (a) the conducting of research,
- (b) the holding of public hearings on matters pertaining to the present or future administration of the Act,
- (c) the publication of studies respecting the Act and its enforcement.⁴⁵

(ii) *The criminal action.*

--Elements of the Offence

It is proposed that a criminal action should lie for a contravention of some of the provisions of the Act.

It was noted in a previous chapter⁴⁶ that only some of the practices specified in the list of prohibited practices are appropriate for criminal prohibition. We tentatively recommend that a criminal action only lie for the practices number 1-16, 18, 19, 23, 24 in the proposed list. We have omitted the practices usually conceived of as unconscionable practices, (26-31) and practices 17, 20, 21, 22 and 25, dealing with affirmative disclosure, advertising substantiation and misleading statements of opinion where the objective of the prohibitions is improved information rather than the elimination of deception per se. All of the omitted practices will, of course, remain subject to administrative and civil sanctions.

--Procedure for Commencement of the Action

The criminal action brought by the State for contravention of the Act would follow the existing procedure under the Combines Investigation Act and amendments. At present, a criminal action lies at the discretion of the Attorney-General under s.15(2) pursuant to an inquiry by the Director. The inquiry may be initiated by the Director himself under the proposed powers outlined in the previous pages or upon application by six persons as is now the case under s.7 of the Combines Investigation Act. We recommend that the current provisions remain intact for the purposes of the proposed Act with the addition of a provision requiring notice of the six person application to the Director to be given to the supplier in question so as to allow him an opportunity to establish the defences to criminal charges that we previously outlined. Should the Director decide to discontinue the inquiry or should the Attorney-General decide not to prosecute upon application of the Director for a prosecution, the Director should be required to inform the applicants for an inquiry of the reasons for the decision (leaving open the possibility of a private prosecution). Consideration could also be given to making the fact of his inquiry generally known to the public.

Within this procedure, it seems advisable, as we have previously argued, to reduce reliance on formal criminal processes by allowing a supplier to pre-empt a criminal action where he is willing to undertake to comply with the Act in the future. Therefore, we recommend a provision similar to s.15 of the B.C. Trade Practices Act, s.10 of the Alberta Unfair Trade Practices Act and s.9 of the Ontario Business

Practices Act whereby the Director may ask for an assurance of voluntary compliance. We propose that the Director be given the following authority:

Where the Director has reason to believe that the supplier has engaged in or is engaging in an act or practice in a contravention of this Act, the Director

- (a) instead of ordering an inquiry into the matter or proceeding with an inquiry into the matter, or making application to the Attorney-General to take proceedings against the supplier, and;
- (b) if he is satisfied that the supplier has ceased engaging in such practices,⁴⁷

may accept from the supplier a written undertaking or assurance in such form and containing such terms and conditions as the Director may determine, and without limiting the generality of the foregoing, the undertaking or assurance may include any of all of the following terms or conditions:

- (c) an undertaking to comply with the requirements of the Act and the regulations⁴⁸
- (d) an undertaking to refrain from engaging in such acts or practices⁴⁹
- (e) an undertaking to redress the consumer or class of consumers designated in the undertaking for any damage or loss sustained by the acts or practices, including money necessarily expended in the course of making or pursuing a complaint to the Director⁵⁰
- (f) an undertaking to make public, in the form and manner prescribed by the Director, the fact of contravention of the Act.
- (g) an undertaking to advertize to the public in the media in such a manner as will assure

prompt and reasonable communication to consumers, on such terms and conditions as determined by the Director, the particulars of the contravention, in order to correct any residual misimpressions created by the act or practice⁵¹

- (h) an undertaking that the consumer transactions involving the supplier and the consumers or class of consumers designated in the undertaking will be carried out by the supplier in accordance with terms and conditions specified in the undertaking⁵²
- (i) an undertaking to reimburse the Director for the costs of any investigation.⁵³

In order that an assurance of voluntary compliance carry with it some greater weight than merely a promise to try harder, it is recommended that on the acceptance of the undertaking, it be deemed, for the purposes of the Act, a statutory order for breach of which a criminal prosecution may lie in its own right without the necessity to prove the original violation.⁵⁴

--Defences

Obviously, compliance with a previous assurance of voluntary compliance in respect of a violation should be a defence to any subsequent criminal prosecution for that violation.

We also recommend the due care defence and subsequent publication of a correction, available to the supplier under s.37.3 of the amendments to the Combines Investigation Act, be retained in the present context but that such a defence be conditional on a third element -- i.e. a reasonable offer of amends to consumers already aggrieved by the violation.

--Sanctions

The major criminal sanction pursuant to a conviction must, of course, remain the traditional sentence of a fine and/or incarceration. As our analysis assumes that the offences designated as "criminal" are to be classified as

"hybrid" offences, an obvious distinction in the severity of the penalty will be made depending on whether the Crown proceeds summarily or by way of indictment.

The fine is the sanction most frequently resorted to in the present Combines Investigation Act for offences under s.36 and s.37, but as noted in our discussion of the nature of the criminal law sanction, its value as a deterrent, at least at present, is subject to some severe reservations.

Our proposals contemplate the merging of the traditional criminal, administrative and civil sanctions within the criminal sentencing process. Thus the fine and/or incarceration are retained as major sanctions, but ancillary to a criminal conviction and as part of the sentencing powers of the court, administrative and civil sanctions may be imposed. Therefore, upon a criminal conviction the following range of sanctions should be available to a court:

(i) Fine. The existing fine ceilings under the Combines Investigation Act have been raised in the proposed amendments and we suggest no further change.

(ii) Incarceration. As this is clearly a little-used sanction in prosecutions for regulatory offences and is likely to remain so, there seems little point in proposing changes to it.

(iii) Prohibition Order. It is proposed that certain administrative sanctions be made available as part of the sentencing powers of the court. Section 30 of the Combines Investigation Act already provides this general prohibitory power and we propose that it be retained. In addition, a corrective advertising order should lie in the discretion of the court in selecting appropriate criminal sanctions.

Thus, at the time of sentence and upon application of the Attorney-General, the Director or a consumer, or class of consumers, the court should be empowered to impose, in addition to any other penalties, a prohibition order and/or an order to publish corrective advertising in the media so as to ensure prompt and reasonable communication with consumers on terms and conditions and in the form dictated by the court. However, an order for corrective advertising

should only be available in the event that the court is convinced that it is necessary in order to correct residual mis-impressions created by the original act or practice upon which consumers are still likely to rely to their detriment.⁵⁵

Breach of these orders, when imposed, would of course result in the commission of further and separate criminal offences.

(iv) Compensation. Again as part of the sentencing process, it is recommended that the court be empowered to order either individual or mass compensation to consumers who have suffered loss by reason of the contravention. A similar compensatory power exists already in the context of e.g. section 653 of the Criminal Code which provides:

(1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

We propose a similar provision whereby upon application of a consumer, class of consumers, the Director or the Attorney-General at the time of sentencing, the court may order compensation in the amount of loss or damage suffered applying the civil damages rule proposed in Chapter IV.

(v) Divestment. In addition to any other sanction, it is recommended that an order in favour of the Crown for divestment of the profits gained from a contravention of the Act lie in the discretion of the court where compensation of aggrieved parties is not reasonably practicable.

(vi) Residual Relief. Finally, it is recommended that the court be vested with discretion, as is presently the case under the Alberta Unfair Trade Practices Act,⁵⁶ to vary the terms of relief and grant residual relief in the form of rescission, restitution, contract modification or such other relief as the court sees fit in the circumstances.

(iii) *Administrative sanctions.*

--Procedure

Section 29.1 of the amendments to the Combines Investigation Act contains a provision for a court to issue a prohibition order upon the application of the Attorney-General of a province. This follows broadly the precedent of s.30 of the Combines Investigation Act. There are several shortcomings to the Federal procedure and while the concept of administrative relief in this area is sound, the qualifications imposed in the amendments limit the effectiveness of the administrative order. The primary objection to s.29.1 is that it imposes too exacting a set of conditions upon the availability of an interim injunction. The rationale for an injunction is the need for quick, effective action to restrain an alleged contravention. For example, s.17 of the B.C. Trade Practices Act and s.15(2) of the Alberta Unfair Trade Practices Act set out proof requirements directed specifically at rebutting the traditional conditions needed to be met for an interim injunction. Thus, in B.C. in an application for an interim injunction the court is required to give greater weight to the protection of consumers than to the interests of the supplier and in both B.C. and Alberta no bond is required to be posted and irreparable harm to the applicant need not be established. The assignment of pre-eminent status to the consumer interest over other interests in the B.C. Act is difficult to defend and, in our view, seems unnecessary. However, we do recommend that the B.C. and Alberta rebuttal of traditional proof requirements -- i.e. the abolition of the necessity to post a bond and to prove irreparable harm, be combined with the further Alberta provision establishing positive proof requirements. Section 15(1) of the Alberta Unfair Trade Practices Act prescribes civil proof requirements for an interim injunction by which the court must be satisfied that there are reasonable and probable grounds for believing that there exists an immediate threat to the interests of persons dealing with the defendant supplier by reason of an alleged unfair act or practice or, alternatively, that the

applicant has established a prima facie case for the existence of an unfair act or practice. This proposal eliminates the restrictive provisions that currently inhibit use of interim injunctions procedures and place in their stead standard and accepted civil proof requirements.

A second shortcoming of the present Federal Act concerns the need for proceedings to be commenced by the Attorney-General. In order that the procedure operate as expeditiously as possible, we recommend that the Director be permitted to apply to the court directly for a prohibition order and ancillary relief.

Under s.29(2) of the amendments to the Combines Investigation Act at least forty-eight hours notice of the application for any injunction must be given to the defendant and we propose that this provision be retained.

--Defences

The only defence to an administrative order that we envisage is the existence of a prior assurance of voluntary compliance obtained by the Director prior to the application for an injunction or during the forty-eight-hour notice period required by s.29(2).

--Remedies

The formulation of appropriate remedies in this context is crucial to the effective operation of the Act as the administrative order is envisaged as likely to become the most common public enforcement procedure, ultimately predominating over criminal sanctions.

Section 16(3) of the B.C. Trade Practices Act provides that in an action for a permanent injunction, whether brought by the Director or any other person, the Court may also order restitutionary relief. Under s.11 of the Alberta Unfair Trade Practices Act, an aggrieved consumer may apply to the Court for injunctive relief and a full range of ancillary relief. The provision of substituted action procedures in both Acts enabling the Director to bring civil proceedings on behalf of aggrieved consumer involves further coalescence of administrative and civil sanctions. We believe that on the making of a final prohibition order, an extensive range of ancillary orders should lie in the dis-

position of the Court. Our regime of administrative sanctions would be framed as follows:

(i) Injunctive and Declaratory Relief. Injunctive and declaratory are the major sanctions contemplated within the administrative scheme. Following the Alberta Unfair Trade Practices Act, the B.C. Trade Practices Act, the court should be empowered to issue interim and permanent prohibition orders restraining the supplier from engaging in the act or practice complained of as well as declaring the act or practice in contravention of the Act.⁵⁷ As a term of a final prohibition order, the court should be empowered to include an order for corrective advertising following s. 16 of the Alberta Unfair Trade Practices Act and s.16 of the B.C. Trade Practices Act where the court, pursuant to a declaration or injunction, may further order the supplier to advertise to the public in the media in such a manner as to ensure reasonable and prompt communication to consumers on terms set by the court, the particulars of any judgment, declaration or order made by the court. As previously submitted, the order for corrective advertising should only lie in cases where there is a reasonable probability that residual misimpressions created by the original act or practice are likely to continue to affect consumers' decisions in the market-place. A court should also be empowered to make interim orders freezing a supplier's assets or appointing a receiver where this is necessary for the protection of consumers (following sections 13 and 13A of the B.C. Act and s.9 of the Alberta Act).

(ii) Compensation. Paralleling the scheme of sanctions we proposed in criminal proceedings where compensation may be ordered pursuant to a criminal conviction, we propose that ancillary relief in the form of compensation be available following an order for injunctive relief. Thus, upon the issuance of declaratory or injunctive relief, the court should be empowered also to order the supplier to compensate consumers or a class of consumers in the amount of any loss or damages suffered as a result of the violation, including restitution of property or money transferred or paid to the supplier. In the calculation of damages, the court should be instructed to apply the civil damages rules outlined in Chapter IV.

(iii) Rescission. In some cases compensation in the form of civil damages will not be an appropriate order and we

propose that again ancillary to an order for administrative relief the court should be vested with discretion to grant rescission or cancellation of a contract or class of contracts.

(iv) Divestment. Again following the scheme proposed for criminal sanctions, we propose that in circumstances where compensation or mass relief are not reasonably practicable, the court have the discretion to order divestment of profits obtained from the contravention in favour of the Crown.

(v) Residual Relief. We propose that a court be empowered to grant such other relief as it considers proper in the circumstances either in relation to individual contracts or classes of contracts (e.g. contract modification in cases of unconscionability). All orders ancillary to a prohibition order should only be made on a final order.

(iv) The substituted civil action.

--Procedure

Two of the three provincial Trade Practices Acts⁵⁸ incorporate the concept of the substituted civil action by the Director on behalf of consumers and we strongly endorse the concept. As noted in Chapter IV the concept of the substituted action solves many of the potential constraints on the litigation of consumer claims by eliminating at least in part the psychological and financial barriers thrown up by the present system. This right of substitution is clearly most appropriate to situations where a large number of consumers have direct or indirect interests at stake e.g. a class action or individual "test" case.

Section 24 of the B.C. Trade Practices Act and s.13 of the Alberta Unfair Trade Practices Act set out the requirements and procedures to be followed in a substituted action and we propose similar provisions be incorporated within our civil redress scheme. Thus, we recommend that where the Director is satisfied that a consumer or class of consumers has a cause of action, defence to a cause of action, grounds for setting aside a default judgment, grounds for an appeal or to contest an appeal, and this is in the public interest he should be empowered to commence or defend a civil action in the name of and on behalf of the consumer or class. In respect of the action, the Director must first seek written

consent of the consumer (in individual claims) and thereafter has the same rights in and control over the proceedings as the individual or class would have had and may conduct the proceedings in any manner he considers appropriate.

--Remedies

The remedies available in this situation should be the same as those awarded upon a successful civil action by the individual or class⁵⁹ and any money received by the Director, excluding costs in the action, should be paid to the consumer or class.

Private Enforcement.

(i) The criminal action.

--Procedure

The private right to bring a criminal prosecution in summary conviction offences exists now under the Criminal Code. Under s.723, proceedings are commenced by laying on information. Under s.735 the summary conviction court proceeds to hold a trial when the prosecutor and defendant appear and the definition of prosecutor includes "an informant", or in other words the person who lays an information. We propose no change in these existing procedures. All violations should be capable of being proceeded with summarily (as the amendments to the Combines Investigation Act propose).

--Defences

The defences outlined on page 325 above pertain equally to criminal actions brought by individuals.

--Sanctions

Whether the action originates with the Attorney-General or an individual, the sanctions available should be the same. However, the severity of the criminal sanction may differ as the individual is limited to prosecuting summary offences. The procedures for application for compensation at the time of sentence and the availability of ancillary administrative relief are also the same procedures outlined on pages 325-328 above.

(ii) The administrative action.

--Procedure

The proposals in this section for the most part follow the existing precedents in the Alberta and B.C. Acts. We propose that an individual or class of consumers should be given the power to bring an action for administrative relief. Using one of two options, either he (or they) can apply to the Director to bring the action in which case the procedure follows the proposals outlined on pages 328, 329, or he can commence the action himself as under s.11 of the Alberta Unfair Trade Practices Act and s.16 of the B.C. Trade Practices Act.

Following these provincial precedents, we recommend that an individual consumer or class of consumers be permitted to institute proceedings against a supplier who has engaged in a contravention of the Act.

--Defences

The defences to this type of action are the same as to an action brought by the Director, noted above on page 329.

--Remedies

The remedies available to the individual class are the same as noted on page 329 above in the discussion of the remedies available in the context of an administrative action brought by the Director.

(iii) The civil action.

--Procedure

Under s.31.1 of the amendments to the Combines Investigation Act, an individual may bring a civil action for loss or damage caused by violation of the Act. The B.C., Alberta and Ontario trade practices legislation also confers extensive rights of civil redress on consumers. We propose no substantial change to these provisions except to empower a class of consumers to sue in respect of similar violations.

--Remedies

The remedies available to an individual or class should be those remedies proposed in the conclusion to Chapter IV. These include rescission, damages and residual relief.

Costs in Enforcement Proceedings

(i) *The Director's costs.* In a criminal or administrative action, we propose that the court be empowered to order costs to the Director of the investigation required prior to the action as is presently the case under s.16(3) of the B.C. Trade Practices Act. Where the Director conducts a substituted civil action, the costs of the action should follow the event as is the usual rule.

(ii) *Individual or class costs.* As we noted in Chapter IV, the potential financial risks involved in civil litigation represent the major constraint in bringing actions particularly in respect of small claims. In that chapter, we discussed means of eliminating in part some of the more compelling financial constraints. In respect of class actions one of these solutions proposed focused on a different cost structure than presently exists; in particular a one-way costs rule for class claims. Thus, in a privately sponsored criminal, administrative or civil action, in the event of successful indemnification should be made on a solicitor/client basis. However, if the action fails, no order for costs should be made unless the action was frivolous or vexatious. Class costs of making applications for compensation at the time of sentence in state-sponsored criminal proceedings or prohibition order proceedings should be awarded on the same basis. Awards or costs in individual suits should allow existing rules in respect of civil claims and orders for costs of application for relief in state sponsored civil actions should similarly follow the event.

Legal Aid. As an individual or class is only fully indemnified against costs in the event of success, the consumer's own legal costs in the event of an unsuccessful action may still present a serious financial disincentive to sue. As noted in Chapter IV, s.170 of the Australian Trade Practices Act provides a partial solution to this problem in allowing an individual to apply to the Director for a grant of assistance to undertake private enforcement initiatives having

prima facie merit. We propose that the government consider the advisability of enacting a provision similar to s.170 but extending it to cover a class application as well.

V. Footnotes

- 1 The general prohibition has not been taken from one specific source as have most of the specific prohibitions, but rather represents an amalgam of the major features of the provincial Trade Practices Acts, re-drafted to accord with our own recommendations.
- 2 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(i), Ontario, Business Practices Act, s. 2(a)(i); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(1); Australia, Trade Practices Act, s. 53(c); U.K., Trade Descriptions Act, s. 2(c)(d)(e)(g).
- 3 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(ii); Ontario, Business Practices Act, s. 2(a)(ii); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(9); Australia, Trade Practices Act, s. 53(d); U.K., Trade Descriptions Act, s. 2(g).
- 4 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(iii); Ontario, Business Practices Act, s. 2(a)(iii); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(2); Australia, Trade Practices Act, s. 53(a).
- 5 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(iv); Ontario, Business Practices Act, s. 2(a)(v); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(3).
- 6 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(v) and (vi); Ontario, Business Practices Act, s. 2(a)(iv); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(3); Australia, Trade Practices Act, s. 53(b).
- 7 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(vii); U.K., Trade Descriptions Act, s. 2(j).
- 8 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(viii); Ontario, Business Practices Act, 2.3(a)(vi); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(4).
- 9 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(ix); Ontario, Business Practices Act, s. 2(a)(vii); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(5).
- 10 Cf. B.C., Trade Practices Act, s. 2(3)(i); Ontario, Business Practices Act, s. 2(a)(viii); Bill C-2, s. 37(2).

- 11 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xi); Ontario, Business Practices Act, s. 2(a)(x); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(8); Australia, Trade Practices Act, s. 53(e).
- 12 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xii); Ontario, Business Practices Act, s. 2(a)(ix); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(7); Australia, Trade Practices Act, s. 53(f).
- 13 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xiii); Ontario, Business Practices Act, s. 2(a)(xiv).
- 14 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xiv); Ontario, Business Practices Act, s. 2(a)(xii); U.S., Uniform Consumer Sales Practices Act, s. 3(b)(10); Australia, Trade Practices Act, s. 53(g).
- 15 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xvi); Ontario, Business Practices Act, s. 2(a)(xi).
- 16 Cf. B.C., Trade Practices Act, s. 2(d)(p).
- 17 Cf. Alberta, Unfair Trade Practices Act, s. 4(1)(d)(xviii).
- 18 Cf. B.C., Trade Practices Act, s. 2(3)(r).
- 19 Cf. Bill C-2, s. 36.4(1); Australia, Trade Practices Act, s. 57.
- 20 Cf. Australia, Trade Practices Act, s. 61, The definition of pyramid selling contained in s. 36.3(1) of Bill C-2 should be retained.
- 21 Cf. Bill C-2, s. 37.2, Australia, Trade Practices Act, s. 54.
- 22 Cf. Bill C-2, s. 36.1(1); U.K., Trade Descriptions Act s. 2(f).
- 23 Cf. U.K., Trade Descriptions Act, s. 2(f).
- 24 Cf. U.K., Trade Descriptions Act, s. 2(h)(i).
- 25 Cf. Ontario, Business Practices Act, s. 2(b)(vii).

- 26 Cf. B.C., Trade Practices Act, s. 3(2)(a); Ontario, Business Practices Act, s. 2(b)(viii).
- 27 Cf. Alberta, Unfair Trade Practices Act, 2. 4(1)(b); Ontario, Business Practices Act, s. 2(b)(i); U.S., Uniform Consumer Sales Practices Act, s. 3(c)(1).
- 28 Cf. Ontario, Business Practices Act, s. 2(b)(ii); U.S., Uniform Consumer Sales Practices Act, s. 3(c)(2).
- 29 Cf. Ontario, Business Practices Act, s. 2(b)(iv); U.S., Uniform Consumer Sales Practices Act, s. 3(c)(4).
- 30 Cf. Ontario, Business Practices Act, s. 2(b)(iii).
- 31 Cf. Ontario, Business Practices Act, s. 2(b)(vi).
- 32 See sections 4, 5, 8, 9 of the B.C., Trade Practices Act, sections 5, 6, 7, 8, 9 of the Alberta, Unfair Trade Practices Act, and s. 5 and 11(2) of the Ontario, Business Practices Act.
- 33 See s. 16 of the B.C., Trade Practices Act and s. 12 of the Alberta, Unfair Trade Practices Act.
- 34 B.C., Trade Practices Act, s. 24; Alberta, Unfair Trade Practices Act, s. 13.
- 35 B.C., Trade Practices Act, s. 4(a).
- 36 B.C., Trade Practices Act, s. 4(b); Ontario, Business Practices Act, s. 5(b).
- 37 See pp. infra on the co-operation between the provinces and the Federal government.
- 38 Alberta, Unfair Trade Practices Act, s. 5(a); B.C., Trade Practices Act, s. 8(1); Ontario, Business Practices Act, s. 11; Combines Investigation Act, s. 8(b).
- 39 Combines Investigation Act, s. 8(c).
- 40 B.C., Trade Practices Act, s. 4(c).
- 41 B.C., Trade Practices Act, s. 4(d).

- 42 B.C., Trade Practices Act, s. 4(e); Ontario, Business Practices Act, s. 5(c).
- 43 Alberta, Unfair Practices Act, s. 5(b); B.C., Trade Practices Act, s. 8(1); Ontario, Business Practices Act, s. 11; Combines Investigation Act, s.9.
- 44 Alberta, Unfair Practices Act, s. 7; B.C., Trade Practices Act, s. 9; Ontario, Business Practices Act, s. 11; Combines Investigation Act, s. 10, 11.
- 45 B.C., Trade Practices Act, s. 5(d).
- 46 See Chapter II.
- 47 Cf. s. 10(1)(a)(b) of the Alberta, Unfair Practices Act, s. 15(1)(a)(b) of the B.C., Trade Practices Act, s. 9(1) of the Ontario, Business Practices Act.
- 48 B.C., Trade Practices Act, s. 15(1)(c).
- 49 B.C., Trade Practices Act, s. 15(1)(d); cf. s. 10(1)(c) Alberta, Unfair Trade Practices Act; s. 9(1), Ontario, Business Practices Act.
- 50 Cf. Alberta, Unfair Trade Practices Act, s. 10(1)(d); B.C., Trade Practices Act, s. 15(1)(e).
- 51 Cf. B.C., Trade Practices Act, s. 16(1); Alberta, Unfair Trade Practices Act, s. 16 in respect to corrective advertising following a prohibition order.
- 52 B.C., Trade Practices Act, s. 15(1)(f).
- 53 B.C., Trade Practices Act, s. 15(1)(h).
- 54 B.C., Trade Practices Act, s. 25(d); Ontario, Business Practices Act, s. 9(2).
- 55 See section 16(1) of the B.C., Trade Practices Act and s. 16 of the Alberta, Unfair Trade Practices Act.
- 56 Alberta, Unfair Trade Practices Act, s. 12(2)(c).
- 57 Cf. B.C., Trade Practices Act, s. 16(1)(a) and Alberta, Unfair Trade Practices Act, s. 12(2)(a).

- 58 Alberta, Unfair Trade Practices Act, s. 13; B.C., Trade Practices Act, s. 24.
- 59 See "--Remedies", infra, page 334, and "Proposals for Reform of Consumer Remedies" in the last section of Chapter IV (p. 275).

